A. hath iſſue *B.* a ſon, and then is attaint of treaſon or felony, and then is pardoned and purchaſeth land in fee ſimple, and then hath iſſue *C.* if *A.* dies, and *B.* ſurvives, and after dies without iſſue, yet the land ſhall eſchete *pro defectu heredis*, for the pardon reſtores not the blood between *A.* and *B.* that was born before; but if *B.* had died without iſſue in the life of *A.* and then *A.* had died, the land ſhould deſcend to *C.* becauſe he was not in being while his father's attainder ſtood in force, but was born after the purging of the crime and puniſhment by the pardon. *Co. Litt.* §. 747.

But reſtitution of blood in its true nature and extent can only be by act of Parliament.

Reſtitutions by parliament are of two kinds, one a reſtitution only in blood, which only removes the corruption thereof, but reſtores not to the party attaint or his heirs the manors or honours loſt by the attainder, unleſs it ſpecially extend to it; the other is a general reſtitution not only in blood, but to the lands, *&c.* of the party attaint.

A reſtitution in blood may be ſpecial and qualified, but generally a reſtitution in blood is conſtrued liberally and extenſively.

A. hath iſſue *B.* a ſon, and is attaint of treaſon and dies, *B.* purchaſeth land in fee ſimple, *B.* by parliament is reſtored only in blood, and enabled as well as heir to *A.* as to all other collateral and lineal anceſtors, provided it ſhall not reſtore *B.* to any of the lands of *A.* forfeited by the attainder, *B.* dies without iſſue; it was ruled, that the lands of *B.* ſhall deſcend to the ſiſters of *A.* as aunts and collateral heirs of *B.* 1. Becauſe the corruption of blood by the attainder is removed by the reſtitution. 2. Altho the words of the act of reſtitution be to reſtore *B.* only as heir to *A. &c.* yet this doth not only remove the corruption of blood, and reſtore him and his lineal heirs in
[359] blood, but alſo his collateral heirs, and removes that impediment, which would have hindred the deſcent to them. *Co. P. C. cap.* 106. *Courtney's* caſe.

It appears *Rot. Parl.* 25 *E.* 3. *n.* 54, 55. that *John Matravers*, that was attainted of treaſon in 4 *E.* 3. obtaind letters patent from the king of reſtitution in blood, but it was not effectual, and therefore there is enacted a general reſtitution as well in blood, as to his land by a charter enacted and confirmed in parliament, namely by the king with the conſent of the lords at the petition of the commons.

II. As to the ſecond matter, namely the forfeiture of the wife's dower.

At

At common law the huſband being attainted of treaſon or felony the wife ſhould loſe her dower, tho it were dower aſſigned *ad oſtium eccleſiæ* or *ex aſſenſu patris*, *Co. Litt.* §. 41. *p.* 37. *ibidem* §. 747. but not upon attainder of miſpriſion of treaſon; but by the ſtatute of 1 *E.* 6. *cap.* 12. and 5 *E.* 6. *cap.* 11. tho her huſband be attainted of felony or murder, ſhe ſhall not loſe her dower.

But by attainder of her huſband of high treaſon or petit treaſon the wife ſhall loſe her dower at this day, unleſs in caſe of attainders of ſuch treaſons, where by ſpecial proviſion of parliament the wife's dower is ſaved, as upon the ſtatutes of 5 and 18 *Eliz.* touching coin.

But if the huſband ſeiſed in right of the wife hath iſſue by her, and then the wife commits treaſon, and is attainted and dies, it ſeems the huſband ſhall be tenant by the courteſy, otherwiſe it were, if the treaſon were committed before iſſue had: *vide Co. Litt.* §. 35.

III. As to the third thing, namely the forfeitures, that happen by attainder, they are of theſe kinds, of lands, or of goods and chattels, or of dignities and honours.

1. As to the forfeiture of lands, generally the lands of all perſons attainted of treaſon belong to the king, but by ſpecial privilege they may belong to a ſubject, as in caſe of the biſhop of *Durham*, *&c. de quo ſupra p.* 254. *&c.*

If at common law tenant in tail were attainted of treaſon, or at this day be attainted of felony, tho the inheritance neither eſchete nor be forfeited, yet the king hath (upon office found) the freehold during the life of the tenant in tail, and not barely a pernancy [360] of profits: adjudged *T.* 29 *Eliz.* *Clenche*'s rep. *Venable*'s caſe, and 3 *Leon. n.* 236. *(c) Co. Litt.* §. 747. and the ſame law it is for tenant of life attaint.

But an attainder of treaſon or felony of a copyholder gives the king no forfeiture, but regularly it belongs to the lord, unleſs ſpecial cuſtom be to the contrary.

By the cuſtom of *Kent*, if the anceſtors be attaint of felony and executed, yet his lands ſhall not eſchete but deſcend to the heir; but if he be attaint by outlawry, or abjure, they are not priviledged by the cuſtom from eſchete.

But if he be any way attaint of treaſon, yet the forfeiture thereof belongs to the king notwithſtanding that cuſtom. 8 *E.* 2. *Preſcription* 50. *Lambard*'s *Perambulatio Kantiæ*, *p.* 551.

(c) p. 185.

If

If the tenant hold lands of a common perſon, and commit treaſon and be attaint, yet the forfeiture belongs to the king of common right, as a royal eſchete; but if ſuch perſon commit felony or petit treaſon and be attaint, the lands eſchete to the lord, of whom they were immediately held, only the king ſhall have the year, day, and waſte of the tenement ſo eſcheted for felony or petit treaſon. *Stamf. Prærogativa Regis, cap.* 16. *(d).*

The commencement of this year and day is neither from the attainder nor from the death of the party attaint, but from the time of the inquiſition found, tho the ſame be not found for many years after the death of the perſon attaint. 49 *E.* 3. 11.

If tenant in tail or for life, or the huſband ſeiſed in right of his wife be attaint of felony, the king ſhall have the year, day and waſte againſt the wife, the iſſue in tail, and him in reverſion. *Stamf. P. C. Lib.* III. *cap.* 30. *(e).* 3 *E.* 3. *Coron.* 327, but of this more hereafter.

The relation of the forfeiture or eſchete of lands for treaſon or felony to avoid all meſne incumbrances is to the time of the offenſe committed.

A. and *B.* joint tenants in fee, *A.* is attaint of treaſon or felony and dies, the land ſurvives to *B.* but yet ſubject to the title of [361] the forfeiture. *H.* 10 *Car. Rot.* 342. *B. R. Harriſon* and *Walden.*

If a man ſeiſed in fee alien, and then be attaint of treaſon or felony by confeſſion or abjuration upon an indictment ſuppoſing the felony committed before the alienation, the alienee may not only falſify the attainder in the point of the time of the felony ſuppoſed, but alſo in the very point of the felony or treaſon itſelf, and is not concluded by the confeſſion of the alienor, tho the alienor himſelf be concluded. 49 *E.* 3. 11. 7 *E.* 4. 1. *Co. P. C. cap.* 104. *p.* 231.

But if he be attaint of felony or treaſon by verdict upon an indictment, ſuppoſing the offenſe before the alienation, tho the alienee cannot falſify the attainder by ſuppoſing there was no felony committed, yet he may falſify it as to the point of time, *viz.* he may allege contrary to the indictment, that the felony or treaſon was committed after the alienation, and not before, *Co. P. C. ubi ſuprà* 32 *Eliz. Syer's* caſe.

If a man be indicted of a felony or treaſon ſuppoſed the 1ſt of *April* 24 *Car.* and in truth it was committed 1 *Junii* 24 *Car.* yet he ſhall

(d) See *Mag. Chart. cap.* 22. 2 *Co. Inſt.* 36. (e) 190 *b.*

be

be convicted notwithſtanding that variance, for the day is not material; yet in ſuch caſe for the avoiding of the danger and trouble, that may enſue by the relation of ſuch attainder to the day mentioned in the indictment, it is fit for the jury to find the true day: *vide Syer's* caſe, *ubi ſupra.*

If a man be outlawed upon an indictment of felony or treaſon, and pending the proceſs he alien the land, yet the king or lord ſhall have the land, which he held at the time of the felony committed, for the indictment contains the year and day, when it was done, unto which the attainder by outlawry relates.

But if a man ſue an appeal by writ of felony or murder, and pending it the party aliens, and then is outlawed before appearance, the lords eſchete is loſt, becauſe it relates only to the time of the outlawry pronounced, in as much as the writ of appeal is general, and contains no certain time of the offenſe committed, cited to be adjudged 5 *E.* 6. *Co. Litt.* §. 4. *fol.* 13. *a.*

But it ſeems, that if the defendant had appeared and the plaintiff had declared upon his writ, and the defendant had [362] been convict and attaint by verdict or confeſſion, or if the appeal had been by bill, and thereupon the party had been outlawed, tho before appearance, the eſchete had related to the time of the fact committed to avoid meſne incumbrances, for in the declaration in the one caſe, and in the bill in the other caſe, the year and day of the felony is ſet forth.

Touching forfeiture of goods.

The goods of a perſon convict of felony or treaſon, or put in exigent for the ſame, or that fled for theſe offenſes, or that ſtands mute, are forfeit to the king.

But the relation of theſe forfeitures refer not to the time of the offenſe committed nor to the time of the flight, but only to the conviction or to the time preſented, or to the time of the exigent awarded.

And therefore an alienation made by the felon or traitor, or perſon flying *bonâ fide* and without fraud, meſne between the offenſe or the flight, and the conviction or preſentment of the flight is good, and binds the king, but if fraudulent, then it is avoidable by the ſtatute of 13 *Eliz. cap.* 5. 3 *E.* 3. *Coron.* 296. *ibidem* 344.

If a man commits a felony and be purſued, and in the flight be killed, whereby he can neither be indicted nor convict, yet if this matter be found by inquiſition before the juſtices in *eyre* or of *oyer* and

and *terminer*, he ſhall forfeit the goods he had at the time of the flight, and not thoſe only, which were his at the time of the inquiſition found, for there it muſt relate to the flight, becauſe the party is dead, and can be no farther proceeded againſt, 3 *E.* 3. *Coron.* 290. 312.

If a party be acquitted of treaſon or felony, the jury that acquits him ought to enquire of his flight for it, and if they find he fled, what goods he had, for his goods and chattels are thereby forfeited; but this is but an inqueſt of office, and therefore is traverſable by the party: *vide Stamf. P. C. Lib.* III. *cap.* 21. *(f).*

[363] But upon an inquiſition before the coroner of the death of a man *ſuper viſum corporis*, tho the party accuſed be acquitted, yet if it be preſented, that he fled for it, it is doubted whether that inquiſition as to the flight be traverſable: *vide Stamf. P. C. Lib.* III. *cap.* 21.

But on all hands it is agreed, that if the coroner upon the inqueſt *ſuper viſum corporis* preſents one as guilty, and that he fled for it, and the party is arraigned and found not guilty, and alſo that he did not fly, yet that doth not avoid the firſt inquiſition as to the flight, but the beſt ſhall be taken for the king, though both are in the nature of inqueſts of office. 22 *Aſſ.* 96. *Forfeitures* 27. 3 *E.* 4. *Forfeitures* 35. *H* 13 *H.* 4. *Forfeitures* 32. 7 *Eliz. Dy.* 238. *b.*

A *fugam fecit* by the principal or acceſſary *before*, in murder, if the fact be preſented before the coroner, entitles the king to the goods of the offender, for theſe are within the cognizance of the coroner, but the coroner hath no power to enquire of acceſſaries *after*, nor conſequently of their flight, and therefore a preſentment before the coroner of the flight of an acceſſary *after* gives the king no title to the goods. 4 *H.* 7. 18.

The uſage was always upon a preſentment of homicide before the coroner, or of flight for the ſame, or upon a conviction of felony by the petit jury, or the finding of a flight for the ſame, to charge the inqueſt or jury to enquire, what goods and chattels he hath, and where they are, and thereupon to charge the *Villata* where ſuch goods are with the goods to be anſwerable to the king: *vide* 3 *E.* 3. *Corone* 296. & *alibi*, *vide* ſtatute 31 *E.* 3. *cap.* 3.

But tho the goods of an offender be not forfeited till the conviction or flight found by inqueſt, yet whether they may be ſeiſed upon the offenſe committed, hath been controverted.

(f) p. 183. *b.*

1. It

1. It ſeems clear, that at common law if a man had committed felony or treaſon, or tho poſſibly he had committed none, yet if he had been indicted or appealed by an approver, the ſheriff, coroner, or other officer could not ſeize and carry away the goods of the offender or party accuſed.

2. Again, he could not in that caſe have removed the goods out of the cuſtody of the offender or party accuſed, [364] and deliver them over to the conſtables or to the *Villata* to anſwer for them. 13 *H.* 4. 13.

3. But if the party were indicted or appealed by an approver, the ſheriff, or other officer might make a ſimple ſeiſure of them only to inventory and appraiſe them, and leave them in the cuſtody of the ſervants or bailiff of the party indicted, in caſe he would give ſecurity againſt their being imbezzled, or in default thereof he might deliver them to the conſtable or *Villata* to be anſwerable for them, but yet ſo that the party accuſed and his family have ſufficient out of them for their livelihood and maintenance (*g*), *viz. Salvis capto & familiæ ſuæ neceſſariis eſtoveriis ſuis, & ſi captus convictus fuerit de feloniâ unde rettatus eſt, reſiduum bonorum ultra eſtoverium illud regi remaneat. Bract. Lib.* III. 123. *Fleta, Lib.* I. *cap.* 26. 43 *E.* 3. 24. 44 *Aſſ.* 14. *Stamf. P. C. Lib.* III. *cap.* 32. *Co. P. C.* 228, 229.

4. And poſſibly the ſame law was, tho he were not indicted or appealed, but *de facto* had committed a felony, but with this difference, if he had been indicted or appealed by an approver, this kind of ſeizure might have been made, whether he committed the felony or not; for in the books of 43 *E.* 3. and 44 *Aſſ.* there is no averment, that the felony was committed, but only that he was thus *accuſed* of record, and ſo is the book of 13 *H.* 4. 13.

But in caſe there were no indictment, then it is at the peril of him that ſeiſeth, if he committed not the felony, and therefore it is iſſuable.

Now touching alterations by the ſtatutes after made.

It ſeems, that by the ſtatute of 5 *E.* 3. *cap.* 9. and the enſuing ſtatutes, whereby it is enacted, that no man's goods ſhall be ſeized into the kings's hands without indictment or due proceſs of law, that it was held, that this kind of ſeizure of the goods of a perſon accuſed of felony, tho it be only *in cuſtodiam & cauſa rei ſervandæ*, hath been held unlawful, if the perſon were not firſt indicted, or at leaſt appeald

(*g*) See *State Tr. Vol.* IV. *p.* 615. Sir *W. Parkin's* caſe.

by

by an approver; and ſo the books ſeem to import of 43 *E.* 3. 24. and 13 *H.* 4. 13. and expreſly my lord *Coke*, *P. C. cap.* 103. *p.* 228.

By the ſtatute of 25 *E.* 3. *cap.* 14. where a party is indicted of felony, the proceſs directed by that ſtatute is firſt a *capias*, and if he be not found a ſecond *capias* together with a precept to ſeize his goods, and if he be not found then, an exigent and the goods to be forfeit.

And this is more than a ſimple ſeizure, ſuch as was before at common law, for if the party came not in, his goods are forfeit upon the award of the exigent; and if he came in, tho his goods be ſaved, yet there is no direction for delivering his goods upon ſecurity; but it ſeems the ſheriff is to take them into his cuſtody, and yet out of them muſt allow ſufficient for the ſuſtenance of the priſoner and his family.

Quære, Whether in the caſe of ſuch a ſeizure, a ſale for a valuable conſideration before conviction and after ſeizure do not bind the king, as it ſeems it doth in a caſe of ſeizure and delivery to the *Villata*: *vide* 8 *Co. Rep.* 171. *Fleetwood*'s caſe.

This ſtatute extends as well to treaſon as to felony, and yet it mentions only felony, and therefore at this day the exigent goes out upon the ſecond *Capias* returned *non inventus*, as well in treaſon, as felony.

By the ſtatute of 1 *R.* 3. *cap.* 3. it is enacted, "That neither ſheriff, *&c.* nor other perſon take or ſeize the goods of any perſon "arreſted or impriſoned before he be convict of the felony according "to the law of *England*, or before the goods be otherwiſe lawfully "forfeited, upon pain of forfeiting the double value of the goods ſo "taken."

Mr. *Stamford* thinks this is but an affirmance of the common law, only that it gives a penalty, but it ſeems to be ſomewhat more than ſo, for this prohibits the ſeizure of the goods of a party impriſoned, tho he were alſo indicted, but not yet convicted, where unqueſtionably the common law allowed ſuch a ſeizure, as is before declared, if the party or his friends did not ſecure the forth-coming of the goods, where the party was indicted.

But upon this ſtatute theſe things are conſiderable.

[366] 1. Whether it extends to treaſon; it ſeems it doth, for as all treaſon is felony and more, ſo in a ſtatute of this nature for advancing of juſtice it ſeems compriſed in it, for it is within the reaſon of the law, and *vide Co. P. C. p.* 228. tho I know it was otherwiſe held, or at leaſt doubted in the caſe of Sir *Henry Vane*, whoſe rents were ſtopt in the tenants hands, and no precept was granted

granted for their delivery, tho before conviction, yea and before the indictment, tho after impriſonment 1661.

2. Whether it extends to a party, that is at large and out of priſon, whether indicted or not indicted, and as to that, 1. It ſeems clearly, that it doth not repeal the ſtatute of 25 *E.* 3. *cap.* 14. touching the ſecond *Capias* with a ſeizure of goods. But 2. As to other perſons, that are at large and not indicted, nor proceſs, as before, made upon their indictment, it ſeems to me, that if they fly not, there can be no ſeizure at all made, whether they are indicted or not, for the ſtatute did not intend a greater privilege to a party impriſoned for an offenſe of this nature, then he that is at large. 3. That if he be at large and fly for it, yet his goods cannot be ſeized and removed, whether he be indicted or not indicted. 4. That if he be indicted and at large, yet the goods cannot be removed, but only viewed, appraiſed, and inventoried in the houſe or place, where they lie. 5. That altho the goods may not be removed, becauſe the ſtatute now hath taken away that removal, that was in ſome caſes at common law, yet neither in caſe of treaſon nor in caſe of felony, where the party is at large, is it within the penalty of the ſtatute as to the point of forfeiture of the double value, for as to that the ſtatute is penal, but it is within the directive and prohibitory part of the ſtatute, which by an equal conſtruction and interpretation prohibits the thing to be practiſed, and hath altered the law as to the removing of the goods of the party before conviction.

And yet I know not how it comes to paſs, the uſe of ſeizing of the goods of perſons accuſed of felony, tho impriſoned or not impriſoned, hath ſo far obtained notwithſtanding this ſtatute, that it paſſeth for law and common practice as well by conſtables, ſheriffs and other the king's officers, as by lords of franchiſes, that [367] there is nothing more uſual: *vide Dalton's Juſtice of Peace, cap.* 110. *(h)* in affirmation of it, *viz.* that the officer may ſtill take ſurety, that the goods be not embezzled, and for want of ſureties may ſeize and praiſe them, and then deliver them to the town ſafely to be kept, until the priſoner be convict or acquit, and cites for it *Stamf.* 192. 8 *Rep.* 171. and *B. Forfeiture* 44.

It ſeems the opinion therefore of my lord *Coke, P. C. cap.* 103. hath truly ſtated the law, at leaſt as it ſtands upon the ſtatute of 1 *R.* 3.

(h) New Edit. cap. 163. *p.* 538.

1. That

1. That before the indictment the goods of any perſon cannot be ſearched, inventoried, nor in any ſort ſeized.

2. That after indictment they cannot be ſeized and removed, or taken away before conviction or attainder; but then it may be ſaid, to what purpoſe may they be ſearched and inventoried after indictment, if they may not be removed, but are equally liable to embezzling as before.

I think he is not bound to find ſureties, neither hath the officer at this day any power to remove them in default of ſureties, and commit them to the vill, but only to inventory them and leave them where he found them, (unleſs in caſe of the ſecond *Capias*, whereof before) for the priſoner or party indicted may ſell them *bonâ fide*; and if he may do ſo, the vendee may take them, and the *Villata* cannot refuſe the delivery of them to the vendee, tho the goods had been delivered to them.

But there is this advantage by the viewing and appraiſing, that thereby the king is aſcertained what the goods are, and may purſue them that take or embezzle them, by information, (if the party happen to be convict) and try the property with them, whether they are really ſold, or ſold only fraudulently without valuable conſideration to prevent the forfeiture, and ſo forfeited by the ſtatute of 13 *Eliz. cap.* 5. notwithſtanding ſuch fraudulent ſale.

IV. Laſtly, touching execution of judgments of treaſon, they are directed by the judgment, whereof before.

[368] There be nevertheleſs ſome things, that accidentally happen, that ſuſpend or abate the execution.

1. Reprieves *ex arbitrio regis vel judicis*, the king may by command or precept under his great or privy ſeal, privy ſignet, or ſign manual, yea by ſignification under the hand of the ſecretary of ſtate, or at this day by the ſubſcription of a maſter of requeſts, command the reprieve of one condemned of treaſon or felony.

And altho the judge, by whom judgment is given, ought to be very cautious in granting a reprieve of one condemned for treaſon before him, yet he may, upon due circumſtances do it, as well in caſe of treaſon, as felony.

And this reprieve he may grant, and after he hath granted it may command execution after the ſeſſions and adjournment of the commiſſion. *Dy.* 205.

There are other reprieves, which are not arbitrary, but *quaſi de jure*.

1. In

1. In reſpect of pregnancy, for tho pregnancy be no plea to delay judgment, yet it is a plea to delay execution and therefore whenever any judgment in treaſon or felony is given againſt a woman, it is the duty of the judge, before he finiſh his ſeſſions, to demand of her what ſhe can allege why execution ſhould not be made; yea in all caſes, where a priſoner attaint is brought into another court, or reprieved to another ſeſſions, he ought not to have any award of execution againſt him, till he be firſt demanded, what he can ſay, why it ſhould not be, for poſſibly he may have a pardon after judgment. 22 *Aſſ.* 71.

This plea of pregnancy *in retardationem executionis* hath theſe incidents to it: 1. She muſt be with child of a quick child. 2. If it be alleged, the judge, before whom it is alleged, muſt impanel an inqueſt of women *ex officio* to enquire of the truth of her allegation, *viz.* whether ſhe be with child of a quick child, and if they find ſhe is, then her execution is to be reſpited, if not, ſhe is to be executed.

If it be found by the jury of women, that ſhe is ſo with child, ſome have uſed to command a reſpite of her execution till a convenient time, for inſtance a month after her delivery, and then to be executed; but this ſeems irregular, for ſhe may have a par- [369] don to plead, and therefore it is to be reſpited till another ſeſſions. 12 *Aſſ.* 10.

If ſhe have once had the benefit of this reprieve and be delivered, and afterwards be with child again with another quick child, ſhe ſhall not have the benefit of a farther reſpite of the ſame judgment for that cauſe: *quod vide* 23 *Aſſ.* 2. *Coron.* 188. 22 *E.* 3. *ibidem* 253.

If the jury of women be miſtaken in their verdict, and find her quick with child, where in truth ſhe was not at all with child, (as once it happened at *Aleſbury*) if the next ſeſſions of goal-delivery, or *oyer* and *terminer* happen at that diſtance, that it is impoſſible by the courſe of nature, that ſhe could be with child, but ſhe muſt be delivered meſne between the former ſeſſions and this, as if it were ten months, &c. ſhe ſhall be executed; but if the ſecond ſeſſions happen within ſuch time after the firſt, that by courſe of nature ſhe may ſtill continue with child, as if it be within the diſtance of ſix months or the like, then ſhe ſhall continue under the firſt reprieve till another ſeſſion, *nam licet tempus ordinarium vitalis fœtus ſit poſt* 16. *vel* 18. *ſeptimanas poſt impregnatam, tamen in quibuſdam citius contingere poteſt juxta medicorum placita.*

If in truth ſhe were not with child with a quick child at the time, when the jury gave their verdict, but became quick after, nay tho ſhe were not at all with child then, but became with child before the time of the ſecond ſeſſion with a quick child, in my opinion ſhe ſhall have a ſecond reprieve by reaſon of pregnancy, for the advantage that ſhe had at firſt was not really becauſe of pregnancy, but by a miſtake of the jury of women, and therefore *in favorem prolis* ſhe ſhall now have it.

And therefore, as hath been ſaid, in all caſes of reprieves for pregnancy the judge ought to make a new demand, what the priſoner hath to ſay, wherefore execution ſhould not be awarded, for the firſt reſpite being by a kind of matter of record ſhall not be determined without a new award of execution; and altho clerks of aſ-
[370] ſiſes enter thoſe reſpites and awards only in a book of *Agenda*, yet regularly they are ſuppoſed to be entered of record, and theſe memorials are warrants for ſuch entries, tho *de facto* it be not uſually done.

Another cauſe of regular reprieve is, if meſne between the judgment and the award of execution the offender become *non compos mentis (i)*, the judge in that caſe may both in caſe of treaſon and felony ſwear a jury to inquire *ex officio*, whether he be really ſo, or only feigned or counterfeit; and thereupon if it be found that he be really diſtracted, muſt award a reprieve *de jure* till another ſeſſions, *Co. P. C. p.* 4. and the ſtatute of 33 *H.* 8. *cap.* 20. that directed an execution of parties convict of treaſon notwithſtanding inſanity intervening after judgment is repeald, by 1 & 2 *P. & M. de quo ſupra p.* 283.

Now as to the abating of ſome parts of the execution in caſe of high treaſon, as drawing, hanging, eviſceration and quartering, and leaving the offender only to be beheaded, this may be, and uſually is by the king's warrant under his great ſeal, privy ſeal, yea or his privy ſignet, or ſign manual, as uſually is done in caſe of noblemen or great men falling under that judgment, for one part of the judgment, *viz.* decollation, and the ſubſtance of the whole judgment, *viz.* the death of the party, is performed.

4 Blackſ. Com. ch. xxix. page 381, 382, 383, 388. ch. xxxi. page 394, &c. ch. xxx. p. 391. See Burn, title Forfeiture.

(i) See Sir *John Hawles*'s remarks on the trial of *Charles Bateman*, *State Tr. Vol.* IV. *p.* 204.

CHAP.

CHAP. XXVIII.

Touching the crime of miſpriſion of treaſon, *and* felony, *&c.*

THO the order propoſed in the beginning ſhould refer miſpriſion of treaſon to that ſeries of offenſes, that are not capital, yet becauſe this offenſe hath relation to treaſon, and may be of uſe to explain the nature of it, I ſhall here take it into conſideration, referring miſpriſion in its large and comprehenſive nature to its proper place.

Miſpriſion of treaſon is of two kinds.

1. That which is properly ſuch by the common law.

2. That which is made miſpriſion of treaſon by act of parliament.

Miſpriſion of treaſon by the common law is, when a perſon knows of treaſon, tho no party or conſenter to it, yet conceals it and doth not reveal it in convenient time.

Tho' ſome queſtion was antiently, whether bare concealment of high treaſon were treaſon, yet that is ſettled by the ſtatute of 5 & 6 *E.* 6. *cap.* 11. and 1 & 2 *P.* & *M. cap.* 10. *viz.* that concealment or keeping ſecret of high treaſon ſhall be deemed and taken only miſpriſion of treaſon, and the offender therein to ſuffer and forfeit, as in caſes of miſpriſion of treaſon, as hath heretofore been uſed: tho in the time of *Henry* VIII. and *Edward* VI. ſome things were made miſpriſion of treaſon, that were not ſo formerly, yet by the ſtatute of 1 *Mar. cap.* 1. it is enacted, that nothing be adjudged to be treaſon, petit treaſon, or miſpriſion of treaſon, but what is contained in the ſtatute of 25 *E.* 3. and altho that act of 25 *E.* 3. do not make or declare miſpriſion of treaſon, yet it doth it in effect by declaring and enacting what is treaſon, which is the matter or ſubject of miſpriſion of treaſon, tho the miſpriſion or concealment thereof be a crime, which the common law defines what it is. [372]

Therefore ſince the ſtatute of 25 *E.* 3. is by the ſtatute of 1 *Mar. cap.* 1. made the ſtandard of treaſon, it remains to be enquired, what ſhall be ſaid the concealment of ſuch a treaſon according to the reaſon and rule of the common law.

If a man knew of a treaſon, by the old law in *Bracton*'s time he was bound to reveal it to the king or ſome of his council within two days, *quod ſi ad tempus diſſimulaverit & ſubticuerit, quaſi conſ.n-*

tiens, & aſſentiens erit ſeductor domini regis (a); but at this day it is but miſpriſion, if he reveals it not as ſoon as he can to ſome judge of aſſiſe, or it ſeems to ſome juſtice of peace, for tho the crimes of treaſon or miſpriſion of treaſon be not within the commiſſion of a juſtice of peace to hear and determine, yet, as it is a breach of the peace, the juſtices of peace may take information upon oath touching it, and take the examination of the offenders and impriſon them, and bind over witneſſes, and tranſmit theſe examinations and informations to the next ſeſſions of gaol-delivery or *oyer* and *terminer* to be further proceeded upon as is truly obſerved by Mr. *Dalton (b)*, *cap.* 90. nay, I have known chief juſtice *Rolls* affirm, that juſtices of the peace may take an indictment of treaſon, tho they cannot determine, *viz.* as an information or accuſation tending to the preſervation of the peace.

But ſome treaſons enacted by ſome ſtatutes are limited to be heard and determined by them, as appears in ſome of the ſtatutes before mentioned, *p.* 350.

It is ſaid 3*H.* 7. 10. *Stamf.* 38. *a. Dalton, cap.* 89. *(c)*, the uttering of falſe money known to be falſe is miſpriſion of treaſon; but it is a miſtake; indeed it is a great miſpriſion, but not miſpriſion of treaſon, unleſs the utterer know him that counterfeited it, and conceal it, this indeed is miſpriſion of treaſon, but not the uttering of it, for the money is not the traitor, but he that counterfeited it, and his counterfeiting is the treaſon. [373]

As all treaſons and declarations of treaſons between 25 *E.* 3. and 1 *Mar.* are repealed by 1 *Mar. cap.* 1. ſo conſequently all miſpriſions of any other treaſon not contained in 25 *E.* 3. are thereby repealed, *Coke P. C. p.* 24. hath theſe words, *Miſpriſion of treaſon is taken for concealment of high treaſon or petit treaſon, and only of high treaſon or petit treaſon ſpecified and expreſſed in the act of* 25 *E.* 3. and in the margin, *that is of ſuch treaſon high or petit, as is expreſſed in the act of* 25 *E.* 3. *and of no other treaſon*; and accordingly uttering of counterfeit coin was agreed by the court *(d)* at *Newgate, Auguſt* 1661. to be neither treaſon or miſpriſion of treaſon within the ſtatute of 25 *E.* 3. but only puniſhable with fine and impriſonment; *ex libro domini Bridgman manu ſuâ ſcripto.*

(a) *Bract. Lib.* III. *de corona, cap.* 3.
(b) *New Edit. cap.* 141. *p.* 460.
(c) *New Edit. cap.* 140. *p.* 452. This laſt book ſays it is miſpriſion of treaſon, but the other two only ſay it is a miſpriſion.
(d) In the caſe of *Richard Oliver, Kel.* 33.

If

If a ſubſequent act of parliament after 1 *Mar.* make a new treaſon, the concealment of ſuch a treaſon is certainly miſpriſion of treaſon for theſe reaſons, 1. Becauſe miſpriſion of treaſon is not any ſubſtantive crime of itſelf, but relative to that, which is, or is made treaſon, and a kind of neceſſary conſequent and reſult from it, as the ſhadow follows the ſubſtance. 2. And hence it is, that tho the ſtatute of 25 *E.* 3. does not by expreſs words enact miſpriſion of treaſon to be an offenſe, yet treaſons being ſettled by that act, the ſtatute of 1 *Mar. cap.* 1. enacts there ſhall be no miſpriſion of treaſon but what is enacted by the ſtatute of 25 *E.* 3. for tho that act ſpeaks not of miſpriſion of treaſon, yet ſettling thoſe things that are treaſon, it doth virtually and conſequentially make the concealing of any of them miſpriſion of treaſon; but yet farther, when the act of 1 & 2 *P.* & *M. cap.* 10. enacts divers new treaſons, tho it enacts nothing to make the concealment thereof miſpriſion, yet in the proviſo abovementioned it takes notice, that concealment of any of theſe treaſons would be at leaſt miſpriſion of treaſon, and therefore provides that the concealment thereof ſhall not be adjudged treaſon, but only miſpriſion of treaſon, any thing above-mentioned to the contrary thereof notwithſtanding; and the like clauſe is in the abovementioned ſtatute of 5 & 6 *E.* 6. *cap.* 11. Again, my lord *Coke*, *P. C. cap.* 65. *p.* 139. ſays, *As in caſe of high treaſon, whether the treaſon be by the common law or ſtatute, the concealment of it is miſpriſion of treaſon; ſo in caſe of felony, whether the felony be by the common law or by ſtatute, the concealment of it is miſpriſion of felony*; ſo that certainly, if a felony or a treaſon be enacted by a new law, the concealment of the former falls under the crime of miſpriſion of felony, and the latter under the crime of miſpriſion of treaſon, as a conſequent of it without any ſpecial words enacting it to be ſo. [374]

All treaſon is miſpriſion of treaſon and more, and therefore, he that is aſſiſting to a treaſon, may be indicted of miſpriſion of treaſon, if the king pleaſe. *Stamf. P. C.* 37. *b. Co. P. C.* 36. 2 *R.* 3. 10. *b.*

Altho the ſtatute of 1 & 2 *P.* & *M. cap.* 10. hath as to treaſons repealed the ſtatute of 33 *H.* 8. *cap.* 23. for trying treaſons in one county committed in another, yet it hath not repealed the ſame ſtatute as to the trial of murder and miſpriſion of treaſon, which may yet be tried according to the ſtatute of 33 *H.* 8. *cap.* 23.

In caſe of miſpriſion of treaſon and miſpriſion of felony, as well

as in caſe of treaſon or felony, or acceſſary thereunto a peer of this kingdom ſhall be tried by peers, but the indictment is to be by a common grand inqueſt. 2 *Co. Inſt.* 49.

The judgment in caſe of miſpriſion of treaſon is loſs of the profits of his lands during his life, forfeiture of goods, and impriſonment during life.

By what hath been ſaid touching miſpriſion of treaſon we may eaſily collect what is the crime of miſpriſion of felony, namely, that it is the concealing of a felony which a man knows, but never conſented to, for if he conſented, he is either principal or acceſſary in the felony, and conſequently guilty of miſpriſion of felony and more.

The judgment in caſe of miſpriſion of felony in caſe the concealer be an officer, as ſheriff or bailiff, *&c.* is by the ſtatute of [375] *Weſtminſt.* 1 *cap.* 9. *(e)* impriſonment for a year and ranſom at the king's pleaſure; if by a common perſon, it is only fine and impriſonment.

And note once for all, that all thoſe acts of parliament, that ſpeak of fines or ranſoms at the king's pleaſure, are always interpreted of the king's juſtices: *vide Co. Magna Carta ſuper ſtat. Weſtminſt.* 1 *cap.* 4. *in fine (f) & ſæpius alibi.* 2 *R.* 3 11. *a. voluntas regis in curiâ*, not *in camerâ.*

And it ſeems, that miſpriſion of petit treaſon is not ſubject to the judgment of miſpriſion of high treaſon, but only is puniſhable by fine and impriſonment, as in caſe of miſpriſion of felony.

II. I come to miſpriſions of treaſon ſo enacted by acts of parliament ſince 1 *Mar. cap.* 1. for, as before is obſerved, by that act all miſpriſions, that by any ſtatute made after 25 *E.* 3. are either expreſsly or conſequentially made miſpriſions of treaſon, are repealed and ſet aſide.

All acts of parliament, that after 1 *Mar.* enacted any thing to be high treaſon, do conſequentially make the concealment thereof to be miſpriſion of treaſon, tho it do not in expreſs words enact the concealment thereof to be miſpriſion of treaſon, as hath been before ſhewn, and the like in caſe of felony.

And conſequently thoſe acts of parliament, which enacted temporary treaſons, as the ſtatute of 1 *&* 2 *P. & M. cap.* 10. the act of 1 *Eliz. cap.* 5. *&c.* ſo far forth as they are temporary, the miſpriſions of ſuch treaſons are alſo temporary, and expire with the act, and

(e) 2 *Co. Inſt.* 172. *(f)* 2 *Co. Inſt.* 168.

where

where the acts of treaſon are perpetual, or being but temporary are made perpetual by ſome other act of parliament, the miſpriſion of ſuch treaſons remains ſuch, as long as the act of parliament making ſuch treaſon continues, or is continued, as upon the ſtatutes of 5 *Eliz.* and 18 *Eliz.* 1 *Mar.* touching counterfeiting of foreign coin made current by proclamation, or clipping or waſhing coin.

And the like is to be ſaid in all reſpects of miſpriſion of felony made ſo by act of parliament.

But beſides theſe crimes, that are conſequentially miſpriſion of treaſon, ſome offenſes are made miſpriſion of treaſon, as a [376] kind of ſubſtantive offenſe, and not conſequential upon the making of treaſon, but particularly enacted.

Thoſe of that kind, that are perpetual and have continuance, are as follow:

14. *Eliz. cap.* 3. "They that counterfeit foreign coin of gold or ſilver "not permitted to be current in this kingdom, their procurers, aiders, "and abetters ſhall ſuffer, as in caſe of miſpriſion of treaſon.

And note, that in that act *(aiders)* are intended of aiders in the fact, not aiders of their perſons, as receivers and comforters, for, as hath been obſerved *p.* 236. in ſome acts of parliament *aiders* being joined with procurers, counſellors and abetters are intended of thoſe, that are aiding to the fact; but in other acts of parliament, where the word *aiders* is joined with maintainers and comforters, it is intended of thoſe, that are aiders *ex poſt facto* to their perſons: ſee this difference in the penning of ſeveral acts of parliament, for the firſt part 5 *Eliz. cap.* 11. 18 *Eliz. cap.* 1. 1 *Mar. ſeſſ.* 2. *cap.* 6. touching coin, and for the ſecond part this expreſs diſtinction obſerved 13 *Eliz. cap.* 2. touching publiſhing of bulls of abſolution, where the former kind are enacted to be traitors; the ſecond incur a *præmunire*; the like 23 *Eliz. cap.* 1.

13 *Eliz. cap.* 2. "If any bull or abſolution, or inſtrument of re- "conciliation to the ſee of *Rome* be offered to any perſon, or if any "perſon be moved or perſwaded to be reconciled, if he conceal the "ſaid offer, motion or perſwaſion and doth not diſcover or ſignify it "by writing or otherwiſe within ſix weeks to ſome of the privy "council, *&c.* he ſhall incur the penalty and forfeiture of miſpriſion "of treaſon, and that no perſon ſhall be impeached for miſpriſion of "treaſon or any offenſe made treaſon by this act, other than ſuch as "are before declared to be in caſe of miſpriſion of treaſon:" *nota*, had

it not been for this cauſe the concealment generally of any treaſon within this act had been miſpriſion of treaſon.

[377] 23 *Eliz. cap.* 1. "All perſons, that ſhall put in practice to "abſolve or withdraw the ſubjects of the queen from their "obedience, or to that end perſwade them from the religion here "eſtabliſhed, or if any perſon ſhall be ſo abſolved, every ſuch perſon, "and their counſellors and procurers thereunto, ſhall be adjudged "guilty of high treaſon.

"And all perſons, that ſhall wittingly be aiders and maintainers of "ſuch perſon ſo offending, or any of them, knowing the ſame, or "which ſhall conceal any offenſe aforeſaid, and not reveal it within "twenty days after his knowledge thereof to ſome juſtice of peace, "or other higher officer, he ſhall ſuffer and forfeit, as in miſpriſion of treaſon.

Blackſ. Com. lib. iv. ch. ix. page 119, 120, 121, &c. 1 Hawk. P. C. ch. xx. & ch. lix. 4 Burn. tit. treaſon, p. 302. 2 Burn. tit. felony, p. 178. Edit. 1776. Foſter 341.

CHAP. XXIX.

Concerning petit treaſon.

AS at common law there was great uncertainty in high treaſon, ſo there was in petit treaſon.

It is true, that all the petit treaſons declared in this ſtatute *(a)* were petit treaſons at common law, as for a ſervant to kill his maſter or miſtreſs, 12 *Aſſ.* 30. a woman to kill her huſband, as appears 15 *E.* 2. *Corone* 383. and the judgment was the ſame at common law in ſuch caſes, as now, and the lands of him, that was attaint of petit treaſon, eſcheted to the meſne lord, of whom they were held, 22 *Aſſ.* 49. ſo that as to theſe things the act of 25 *E.* 3. was but an affirmance of the common law.

But yet there were certain offenſes, that were petit treaſon at common law, that are reſtrained and abrogated by this ſtatute from being petit treaſon.

[378] 15 *E.* 2. *Corone* 383. A woman intending to kill her huſband beat him ſo, that ſhe left him for dead, but yet he recovered, for this attempt the wife had judgment to be burned.

(d) viz. 25 *Edw.* 3.

Fleta,

Fleta, *Lib.* I. *cap.* 22. *Britton*, *cap.* 8. If the homager or ſervant falſify the ſeal of his lord, or had committed adultery with the lord's wife or daughter *(b)*, it was petit treaſon.

But theſe are taken away by this act of 25 *E.* 3. and are reduced only to theſe three ranks:

1. The ſervant killing his maſter or miſtreſs. 2. The wife killing her huſband. 3. The clergyman killing his prelate or ſuperior, to whom he owes faith and obedience.

All petit treaſon comes under the name of felony, and a pardon of all felonies, where petit treaſon is not excepted, at common law pardoned petit treaſon, and ſo at this day doth a pardon of murder.

A man or woman, that commits petit treaſon, may be indicted of murder, but if all felonies, *&c.* are pardoned by act of parliament, wherein there is an exception of murder, it ſeems that a murder, which is a petit treaſon alſo, is diſcharged and not within the exception, *M.* 6 & 7 *Eliz. Dyer* 235. *(c)*

The killing of a maſter or huſband is not petit treaſon, unleſs it be ſuch a killing, as in caſe of another perſon would be murder, and therefore upon an indictment of petit treaſon for a ſervant killing his maſter, if upon the circumſtances of the caſe it appears to be a ſudden falling out, and the ſervant upon a ſudden provocation kills his maſter, which, in caſe it had been between other perſons, had been only manſlaughter, the jury may acquit him of petit treaſon, and find him guilty of manſlaughter; and thus it was once done before me at *Dorcheſter* aſſizes, and another time before juſtice *Windham* at *Coventry* aſſizes, tho the indictment were for petit treaſon.

If a wife conſpire to kill her huſband, or a ſervant to kill his maſter, and this is done by a ſtranger in purſuance of that conſpiracy, it is not petit treaſon in the ſervant or wife, becauſe the principal is only murder, and the being only acceſſary, where the principal is but murder, cannot be petit treaſon; but if the wife and a ſervant conſpire the death of the huſband, being his maſter, and the ſervant effect it in the abſence of the wife, it is petit treaſon in the ſervant, and ſhe is acceſſary before to the petit treaſon, and ſhall accordingly be indicted and burnt *P.* 16 *Eliz. Dy.* 332. *a.* 40 *Aſſ.* 25. [379]

(b) *Britton* adds, *or the nurſes of his children.*

(c) The reaſon of this is, becauſe petit treaſon is an offenſe of another ſpecies, 6 *Co. Rep.* 13. *b.* but then by the ſame reaſon a pardon of *murder* does not include a pardon of *petit treaſon*, nor can one guilty of *petit treaſon* be indicted of *murder*. See *Rex verſus Criſpe*, *State Tri. Vol.* VI. *p.* 224, 225.

If

If the ſervant and a ſtranger, or the wife and a ſtranger conſpire to rob the huſband or maſter, and the ſervant or wife be preſent and hold the candle, [while the huſband or maſter is *killed**,] the ſtranger is guilty of murder, and the wife or ſervant guilty of petit treaſon as principal, becauſe preſent. 2 & 3 *P. & M. Dy.* 128. *a.*

So that the ſtatute of 25 *E.* 3. doth not only extend to the party, that actually commits the offenſe, but alſo to thoſe that were procurers, aiders or abettors, *ſcilicet*, if they be preſent, they are guilty of petit treaſon as principals, if abſent, yet if the offenſe in the principal be petit treaſon, the offenſe in the acceſſary *before* is petit treaſon, as acceſſary, as in *Brown*'s caſe, *Dy.* 332. *a.*

If a wife or a ſervant intending to poiſon or kill a ſtranger, and miſſing the blow the wife by miſtake kills or poiſons her huſband, or the ſervant his maſter, this, that would have been murder, if it had taken effect againſt the ſtranger, becomes petit treaſon in the death of the huſband or maſter. *Plowd. Com.* 475. *b. Crompt. de pace regis* 20. *b.* and *Dalt. cap.* 91. *(d)*; ſo if he ſhoot at *J. S.* and miſſing him kills his maſter. *Ibid.*

If the wife or ſervant conſpire with a ſtranger to kill the huſband or maſter, if the wife or ſervant be in the ſame houſe, where the fact is done, tho not in the ſame room, it is petit treaſon in them, and they are principals in law, becauſe in law adjudged to be preſent, when in the ſame houſe; but if they had been abſent, then they had been only [380] acceſſaries before the fact to murder. *Crompt. de pace regis* 21. *a. Blechenden*'s caſe.

If the wife or ſervant command one to beat the huſband or maſter, and he beat him, whereof he dies, if the wife or ſervant be in the ſame houſe, it is petit treaſon in the wife or ſervant as principals, but murder in the ſtranger. *Crumpt.* 20. *b. Plowd. Com.* 475. *b.*

For whatſoever will make a man guilty of murder will make a woman guilty of petit treaſon, if committed upon the huſband, or the ſervant, if committed upon the maſter.

Eadem lex mutatis mutandis for an inferior clergyman in relation to his ſuperior.

But now to deſcend to particulars.

I. A ſervant killing his maſter.

Who ſhall be ſaid *a ſervant* or *a maſter*.

* Theſe words are not in the *MS.* but they are in the caſe cited from *Dyer*, and the ſenſe plainly requires them.

(d) *New Edit. cap.* 142. *p.* 362.

If the ſervant kills his miſtreſs or his maſter's wife, this is petit treaſon within this act. 19 *H.* 6. 47. *Plowd. Com.* 86. *b. Co. P. C.* 20. 12 *Aſſ.* 30.

If a ſervant, being gone from his maſter, kills him upon a grudge, that he conceived againſt his maſter, while he was in his ſervice, which he attempted while his ſervant, but was diſappointed, it is petit treaſon. 33 *Aſſ.* 7. *Plowd. Com.* 260. *a. Co. P. C.* 20.

If a child live with his father as a ſervant, as if he receive wages from him, or meat and drink for his ſervice, or be bound apprentice to him, and kills his father or mother, this is petit treaſon at this day. *(f)*

But if he receives no wages, nor meat and drink for his ſervice, or be not bound apprentice to him, but only is his ſon and not his ſervant, and kills his father, this was petit treaſon at common law. 21 *E.* 3. 17. *b. per Thorp (g)*; but the better opinion is, that it is not petit treaſon at this day, becauſe this ſtatute of 25 *E* 3. ſhall not in this caſe be extended by equity: *quod vide Co. P. C.* 20. *Lambart Juſtic.* 248. *Crompt* 19. *b.*

II. The wife killing her huſband.

If the huſband kill the wife it is murder, not petit treaſon. [381] becauſe there is ſubjection due from the wife to the huſband, but not *è converſo.*

If the wife be divorced from the huſband *cauſâ adulterii vel ſævitiæ*, ſhe is yet a wife within this law, becauſe this diſſolves not the *vinculum matrimonii* by our law, for they may cohabit again, but otherwiſe it is, if they be divorced *cauſâ conſanguinitatis* or *præcontractûs*, for then the *vinculum* is diſſolved, they are no more huſband and wife.

If *A.* be married to *B.* and during that intermarriage *A.* marries *C.* tho *C.* be, as to ſome purpoſes, a wife *de facto*, yet ſhe is not a wife within this law, for the ſecond marriage was merely void, tho perchance ſhe may, upon circumſtances, be a ſervant within the former clauſe, if ſhe cohabit with *A.* and he finds her neceſſaries for her ſubſiſtence; *tamen quære.*

III. The clergyman killing his prelate, *&c.*

If a clergyman living and beneficed in the dioceſe of *A.* kills the biſhop of *that* dioceſe, it is petit treaſon; but if he kills the biſhop of the dioceſe of *B.* it is only murder.

(*f*) 1 *Mar. Daliſon* 14.

(*g*) The book ſays, he was iudicted for killing his *mere* (his mother) but *Coke P. C. p.* 20. ſays it is miſprinted, and that it ſhould be read *maiſtre*, *(his maſter)* for mre being abreviated, (as perhaps it was in the *MS.* of the year books) may be read either way, tho the laſt ſeems the moſt probable.

If

If a clergyman hath a benefice in the dioceſe of *A.* and after, by diſpenſation takes a benefice in the dioceſe of *B.* if he kills the biſhop of one dioceſe or the other, it is petit treaſon, for he owes and ſwears upon his inſtitution canonical obedience to the biſhop of each dioceſe.

If a clergyman beneficed in the dioceſe of *A.* within the province of *C.* kills his metropolitan, it ſeems it is petit treaſon, tho he be not his immediate ſuperior.

If a clergyman be ordained by the biſhop of *A. in ordinem diaconi, ſive preſbyteri ſine titulo*, yet it ſeems if he kills the biſhop it is petit treaſon, for he profeſſeth canonical obedience upon his ordination.

Concerning proceedings in petit treaſons.

In high treaſon all are principals, but in petit treaſon there are principals and acceſſaries, as well *before*, as *after*.

If the principal be only murder, as being committed by a ſtranger, the acceſſary cannot be petit treaſon, tho ſhe be a wife or ſervant. *Dy.* 332. *Brown*'s caſe *ubi ſupra*.

[382] But if the principal be petit treaſon, as being committed by a wife upon her huſband, or by a ſervant upon his maſter or miſtreſs, if the acceſſary be of the ſame relation, *viz.* a ſervant or wife, the judgment ſhall be given againſt the acceſſary, as in petit treaſon; but if the acceſſary, whether before or after, be a ſtranger, tho ſuch ſtranger be an acceſſary to petit treaſon, yet the judgment ſhall be as in a caſe of felony againſt the acceſſary, *viz. quod ſuſpendatur*, for tho he be an acceſſary to petit treaſon, which is the principal, yet ſuch acceſſary being a ſtranger is not, nor can be guilty of petit treaſon, becauſe a ſtranger to the party killed, and neither wife nor ſervant.

At common law, and by the ſtatute of 25 *E.* 3. *cap.* 4. clergy was allowable in caſe of petit treaſon, but not in caſe of high treaſon; but now by the ſtatute of 23 *H.* 8. *cap.* 1. 1 *E.* 6. *cap.* 12. clergy is excluded from petit treaſon, as well as murder, and in the ſame kind.

If a perſon arraigned of high treaſon ſtands wilfully mute, he ſhall be convicted as hath been formerly ſhewn; but if arraigned of petit treaſon, he ſtand mute, he ſhall have judgment of (*) *peine fort & dure*. *Crompt.* 19. *b. Co. P. C.* 217.

The judgment of a woman convict of petit treaſon is to be burnt (*h*), but (by *Stamf. P. C. fol.* 182. *b.*) in high treaſon to be drawn and

(*) [*Peine fort & dure*] but now ſee the *Stat.* 12. *Geo.* 3. *ch.* 20. as to a perſon, arraigned on any indictment, ſtanding mute. And 3 *Burn. Edit.* 1776. *p.* 211.

(*h*) The judgment of a woman convict of petit treaſon (or in caſe of coin) is all one as in high treaſon, *viz. to be drawn and burnt*. *Co. P. C. p.* 211. and ſo is the conſtant practice.

and

and burnt, unleſs it be in caſe of coin, and then only to be burnt, as in caſe of petit treaſon.

But the judgment againſt a man convict of petit treaſon is to be drawn and hanged, *trahatur & ſuſpendatur per collum.*

Stamford in *P. C.* 182. tells us, that the execution of drawing is to be upon a hurdle, but 33 *Aſſ.* 7. *Shard* juſtice commanded, that nothing ſhould be brought, whereupon he ſhould be drawn, *mes que ſans cley ou autre choſe a deſouth lui ſoit tray de chivaux hors de la ſale, ou il avoit judgement, tanque a les furc, &c.* but that ſeverity is diſuſed: he is in ſuch caſes drawn upon a hurdle to the place of execution.

And thus far touching petit treaſon.

4 Blackſ. Com. ch. 6. p. 92. ch. xiv. p. 20. 203, 204. Foſter, 337, 107, 324, 336. 1 Hawk. P. C. ch. 32. 4 Burn. Edit. 1776. p. 301.

CHAP. XXX. [383]

Concerning hereſy *and* apoſtacy, *and the puniſhment thereof.*

UNDER the general name of *hereſy* there hath been in ordinary ſpeech comprehended three ſorts of crimes: 1. *Apoſtacy*, when a chriſtian did apoſtatize to *Paganiſm* or to *Judaiſm*, and the puniſhment hereof, as well by the law of this kingdom, as by the imperial laws, ſeems to have been by death, namely burning. *Bract. Lib.* III. *de coronâ, cap.* 9. *(a).* by the imperial law he was ſubject to loſs of goods, *Cod. de apoſtatis, tit.* 7. *lege* 1. but it appears not, whether he were to ſuffer death, *Ibid. l.* 6. unleſs he ſolicited others to apoſtacy *(b).* 2. *Witchcraft, Sortilegium* was by the antient laws of *England* of eccleſiaſtical cognizance, and upon conviction thereof without abjuration, or relapſe after abjuration, was puniſhable with death by writ *de hæretico comburendo, vide Co. P. C. cap.* 6. *& libros ibi, Extr' de hæreticis, cap.* 8. §. 5. *n.* 6. 3. *Formal hereſy*; the old popiſh canoniſts define an heretic to be ſuch, *qui male ſentit vel docet de fide, de corpore Chriſti, de baptiſmate, peccatorum confeſſione, matrimonio, vel aliis ſacramentis eccleſiæ, & generaliter, qui de aliquo prædictorum vel de articulis fidei aliter prædicat, ſentit vel doceat, quam docet ſancta*

(a) *p.* 123. *b.* (b) Then it was capital, *Lib.* I. *Cod. tit.* 7. *l.* 5.

mater

mater eccleſia; and whereas the antient councils and imperial conſtitutions grounded thereupon kept the buſineſs of hereſy within certain bounds and deſcriptions, as the *Manichees*, *Neſtorians*, *Eutychians*, *&c. quod vide in Codice*, *Lib.* I. *tit.* 5. *de hæreticis*, *l.* 5. in the edict of *Theodoſius* and *Valentinian*; the papal canoniſts have by ample and general terms extended hereſy ſo far, and left ſo much in the diſcretion of the ordinary to determine it, that there is ſcarce any the ſmalleſt deviation from them, but it may be reduced to hereſy according to the great generality, latitude, and extent of their definitions and [384] deſcriptions, whereof ſee the gloſs of *Lindwood* in *titulo de Hæreticis*, *cap.* 1. *Reverendiſſimæ* ad verbum *declarentur*: the definition of *Groſtead*, tho ſomewhat general, is much more reaſonable as we have it given by Mr. *Fox*, *Acts & Mon. part.* 1. *p.* 420. *Eſt ſententia humano ſenſu electa, palàm docta, pertinaciter defenſa*; but of this more hereafter.

In this buſineſs of hereſy, and the puniſhment thereof, I ſhall, as near as I can, uſe this method: 1. I will conſider in general who is the judge of hereſy according to the common and imperial law. 2. Who ſhall be ſaid an heretic according to thoſe laws. 3. What the puniſhment of an heretic is according to thoſe laws: then I ſhall conſider more ſpecially, *viz.* 1. What was the method of the conviction of hereſy according to the antient law uſed in *England* before the time of *Richard* II. and *Henry* IV. And 2. What was the uſual puniſhment of hereſy here in *England* before the time of *Richard* II. and *Henry* IV. 3. I ſhall give an account touching the proceeding againſt heretics from the beginning of *Richard* II. to the twenty-fifth year of king *Henry* VIII. 4. What is the method of proceeding, and how the law touching hereſy, heretics, and their puniſhment from 25 *H.* 8. until the firſt year of queen *Elizabeth*. 5. How the law ſtood from 1 *Eliz.* to this day touching this matter.

I. According to the common and imperial law, and generally by other laws in kingdoms and ſtates, where the canon law obtained, the eccleſiaſtical judge was the judge of hereſies, and hereby they obtained a large juriſdiction touching it, ſo that there was ſcarce any thing, wherein a man diſſented from the doctrine or practice of the *Roman* church, but they took the liberty to determine heretical, *qui a recto tramite, & judicio eccleſiæ catholicæ detectus fuerit deviare, & is qui dubitat de fide catholicâ*, yea even, *qui deſpicit & negligit ſervare ea, que Romana eccleſia ſtatuit vel ſervare decreverat: vide Lindwood de*

de hæreticis in cap. Reverendiſſimæ *ad verbum* declarentur, which left and exceſſive arbitrary latitude in the eccleſiaſtical judge, and a great ſervitude and uncertainty upon men ſubject to their cenſures: the eccleſiaſtical judge was either extraordinary, *viz.* certain inquiſitors thereunto deputed by the pope, or ordinary, which [385] was the biſhop of the dioceſe, as appears by *Lindwood de hæreticis, cap.* finaliter *verb.* ordinarius *in gloſſa*; (*) only for the more ſolemnity of the buſineſs of degradation, which accompanied the ſentence of hereſy upon one in orders before the offender was left to the ſecular power, there were ſix, but afterwards three biſhops to be preſent in degradation *à ſacris ordinibus, viz.* the epiſcopal, *Preſbyteratus, Diaconatus & ſubdiaconatus*, but *in minoribus ordinibus* there was only required the biſhop and his chapter, *canonici ſive clerici*, 6 *decretal, cap.* 2. afterward the buſineſs of degradation was reduced to one biſhop, *viz.* the ordinary of the place, ſo far at leaſt as the ſame reſpected the *ordo Preſbyteratûs* and inferior orders.

But I do not find, that by the canon or civil law the declaratory ſentence of hereſy was neceſſary in a provincial ſynod, tho in great caſes, eſpecially where a prieſt was to be degraded, it was moſt commonly done in a provincial ſynod, partly for the greater ſolemnity of the buſineſs, and partly becauſe in ſuch ſynods more biſhops and others of the clergy were preſent; but how the uſe was in *England* we ſhall hereafter ſee.

II. As to the ſecond, touching heretics and their diſcriminations according to the canon law, they may be diſtinguiſhed into three ranks: 1. *Simplex hæreticus.* 2. *Hæreticus contumax.* 3. *Hæreticus relapſus.*

1. A ſimple heretic was ſuch, as held an heretical opinion, but being convened before the ordinary, and the opinion being ſubſtantially declared heretical, and the party convicted thereof, declares his penitence and abjures his opinion, in this caſe he was diſmiſſed without farther puniſhment, and this abjuration might be required by the ordinary, and was of two kinds, *viz.* a ſpecial abjuration, whereby he abjured that ſingle heretical opinion, for which he was condemned, or a general abjuration, whereby he renounced all heretical opinions: *vide Lindwood de Hæreticis, cap.* Reverendiſſimæ *verb.* niſi reſipiſcant & abjuraverint in forma eccleſiæ conſueta: and this abjuration might be required not only of thoſe, that were detected [386]

(*) See alſo *Lindwood de hæreticis, cap.* item quia *verb.* ordinarii.

and

and convicted of hereſy, but even of thoſe, that were *graviter ſuſpecti*; and if they refuſed it, they proceeded to ſentence them as convict: *Extr' de Hæreticis, cap.* ad abolendam.

2. A contumacious heretic was among them of two kinds: 1. Such as refuſed to appear before the ordinary, being accuſed of hereſy, and thereupon were duly excommunicate and ſo continued excommunicate for one year, *tum velut hæreticus condemnetur*, and was thereupon delivered or left to the ſecular power, *de hæretecis, cap.* 7. *cum contumaciâ in* 6*to*, &c. 2. Where the party accuſed of hereſy was convict by teſtimony or his own confeſſion, and refuſed to repent and abjure, ſuch a one might thereupon be ſentenced as an heretic, and delivered over to the ſecular power, but yet he had this favour or privilege, if even after ſuch ſentence he willingly repented and abjured, the ordinary ought to accept thereof, and not deliver him over to the ſecular power, but he was ſpared. *Lindwood de Hæreticis, cap.* Reverendiſſimæ *verb.* reſipiſcant, & *Extr' de Hæreticis, cap.* ad abolend. *verb.* ſponte recurrere; but then the ordinary might detain him in priſon: *vide accordant* 1 *Mar. Br. Hereſy.*

3. A relapſed heretic: and herein they diſtinguiſh between *fictè relapſus*, & *verè relapſus*: *Lindwood de Hæreticis cap.* item quia, *verb.* relapſo: 1. The former is where a man is accuſed of hereſy, and is under a great ſuſpicion thereof, but not convicted, only the ordinary puts him to abjure, which accordingly he doth, and afterwards doth entertain, viſit, or comfort heretics, ſuch a perſon by the canon law may be ſentenced as an heretic relapſed, and delivered over to the ſecular power, but yet the ordinary may, as before, detain him in priſon without actual delivering of him over to the ſecular judge to be executed. *Lindwood ubi ſupra*, & *in* 6*to decretal. cap.* 8. *Accuſat' de hæreticis.* 2. *Verè relapſus* is, when a man being convicted of hereſy, and abjuring again falls into hereſy, if he be thereupon convicted and ſentenced, there can be no ſuſpenſion of the ſentence by the ordinary, tho the party repent and conform, but he muſt be delivered over to the ſecular power, and the ſentence ought to be given, and is not by any means to be ſuſpended from execution: 6*to de Hæreticis, cap.* 4.

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But this relapſing is of two kinds according to the quality of his abjuration: if the abjuration be general of all hereſies, if he after fall into any hereſy, either *that* whereof he was formerly accuſed and convicted, or any other, he is to be ſentenced as a relapſed heretic; but

if

if the abjuration be only ſpecial of *that* hereſy whereof he is accuſed, then he is not to be ſentenced, as a relapſed heretic, unleſs he after fall again into the ſame hereſy, which he ſo ſpecially abjured; but herein there is ſome difference among the doctors, for ſome think even after a ſpecial abjuration of one particular hereſy, if he falls into another hereſy, *cenſetur relapſus: vide Extr. de Hæreticis, cap. Accuſat.* §. 2. *Eum vero in* 6*to* & *Lindwood de hæreticis, cap.* Item quia *verbo* ſimpliciter *in gloſſa:* but the ordinary may put this out of queſtion, for it ſeems by the canon law he may at his pleaſure in caſes of hereſy require a general abjuration, *viz. de hæreſi generaliter & ſimpliciter.*

III. Now as to the puniſhment itſelf of hereſy, eſpecially of thoſe that are either *contumaces*, or *relapſi:* 1. By the civil law; it is true, that the conviction and ſentencing of heretics is as well thereby, as by the canon law, left to the eccleſiaſtical judge, ſo that without a declaration or ſentence of the eccleſiaſtical judge the civil juriſdiction cannot proceed to inflict any puniſhment. *Lindwood de hæreticis, cap.* Reverendiſſimæ *verb.* confiſcata *in gloſſe* tho confiſcation of goods of the heretic followed upon his conviction, *neceſſaria tamen eſt ſententia declarativa judicis ſuper ipſâ confiſcatione, & hæc ſententia fieri ſolummodò debet per judicem eccleſiaſticum, & non per judicem ſæcularem: vide in* 6*to de hæreticis, cap.* ſecundum leges.

But tho the deciſion and judicial ſentence of hereſy was belonging only to the eccleſiaſtical judge, yet the civil conſtitutions of emperors and princes did inſtitute and enact ſeveral penalties, as conſequential upon ſuch ſentence, ſuch as were confiſcation of goods, diſheriſon of heirs, and in ſome caſes death, as we ſhall ſee hereafter: *quod vide in Codice, Lib.* I. *tit.* 5. *de hæreticis per totam.*

As to the penalty of death *ultimum ſupplicium:* it ſhould [388] ſeem the antient imperial conſtitutions made a difference between hereſies in relation to that puniſhment: it appears by the edict of *Theodoſius Codice, cap.* 4. the *Manichees* and *Donatiſts* were puniſhed with death, and poſſibly ſo were the *Neſtorians, ibidem cap.* 6. and generally all heretics, that ſeduced the orthodox to rebaptization, *ibid. cap.* 23. many other heretics were under milder ſentences, ſome were puniſhed with exile, ſome with extermination from the city, ſome with pecuniary mulcts, and ſome with confiſcation, which, it ſeems, was the moſt uſual puniſhment: but it ſeems that by the conſtitution of the emperor *Frederic,* (which yet is not

extant) *Hodie indiſtinctè illi, qui per judicem eccleſiaſticum ſunt damnati de hæreſi, quales ſunt pertinaces & relapſi, qui non petunt miſericordiam ante ſententiam, ſunt damnandi ad mortem per ſæculares poteſtates, & per eas debent comburi ſeu igne cremari. Lindwood de hæreticis, cap.* Reverendiſſimæ *verb.* pœnas; and from this conſtitution of *Frederic* the courſe of burning generally all heretics indiſtinctly, if pertinacious or relapſed, took its riſe.

Now as to the penalties by the canon law, it is true they go no farther than eccleſiaſtical cenſures, injunction of penance, excommunication, and deprivation of eccleſiaſtical benefices; but yet they made bold by ſome of their conſtitutions to proceed farther, and indeed farther than they had authority; ſuch were among others impriſonment by the ordinary, and confiſcation of goods *(c)*, but whether they adventured hereupon only in ſubſervience to civil conſtitutions, or whether by their own pretended power, may be doubtful; but howſoever, it is ſo decreed in their canons and conſtitutions: *vide Lindwood de hæreticis, cap.* Reverendiſſimæ *verb.* confiſcata, & *ibidem* Item quia *verb* ſententialiter.

But indeed as to the inflicting of death upon heretics, their canons go not ſo far as that; neither indeed need they, for emperors and princes being induced by them to enact ſuch ſevere conſtitutions they did in effect the buſineſs by ſentencing the heretic, and [389] then leaving him to the ſecular power, ſo that the ſecular power was only in nature of their executioner; and altho they direct in ſome caſes of treaſon an interceſſion to be made to the ſecular power to ſpare the life of the offender thus committed over to the ſecular power, *Extr. de verborum ſignificatione cap.* Novimus, yet we find no ſuch curteſy for heretics, but the princes, that do not effectually proceed according to the utmoſt of their power to eradicate them, are threatned with excommunication, and accordingly they are required to take an oath to perform it, *Extr. de hæreticis, cap.* Ad abolendam. (*)

Therefore as to the puniſhment of heretics with death, of an heretic ſo declared by the biſhop, it was left to the ſecular power with this difference, if the perſon convicted were a layman, he was immediately after his ſentence to be delivered to the ſecular power to be

(c) For in *England* before the ſtatute of 2 *H.* 5. *cap.* 7. neither lands nor goods were forfeited by a conviction for hereſy. 3 *Co. Inſtit.* 43.

(*) *Vide Conſtit. Frederici*, §. 6.

burnt;

burnt; but if he were a clergyman within the greater or leſſer orders, he was firſt ſolemnly degraded, beginning with the chiefeſt order he had, as that of prieſthood, and ſo to the loweſt, *damnati per eccleſiam judici ſæculari relinquentur animadverſione debita puniendi, clericis a ſuis ordinibus primo degradatis. Extr de hereticis, cap.* excommunicamus; (†) the ſolemnity whereof ſee at large in *6to decretal. de pœnis cap.* Degradatio, *Fox*'s *acts and monuments part* 1. *p.* 674. the degradation of *William Sawtre.*

This degradation by the latter cannons might be by one biſhop, tho formerly it required more.

When the ſentence was given by the ordinary, and the offender thus left to the ſecular power, he was delivered over to the lay-officer, and then a mandate or writ iſſued from the chief magiſtrate to execute the offender according to the ſecular law; but of this more particularly hereafter.

I have been the longer in theſe particulars, that we thereby may obſerve theſe two things: 1. How miſerable the ſervitude of chriſtians was under the papal hierarchy, who uſed ſo arbitrary and unlimited a power to determine what they pleaſed to be hereſy, and then *omni appellatione poſtpoſita* ſubjecting men's lives to their ſentence. (*) 2. How finely they made the ſecular power their [390] vaſſals in execution of this odious piece of drudgery, as it was managed and practiſed by them.

I come now to a cloſer conſideration of hereſy, and its puniſhment according to the uſage received in *England*, and the laws relating thereunto, according to the method above propounded.

I. Therefore how the uſage and law obtained concerning this matter in *England* before the time of *Richard* II.

As the romiſh religion was generally received here in *England* in this period ſo the manner of proceeding touching hereſy was much according to the papal decretals and conſtitutions, whereof a large account is above given.

The juriſdiction, wherein hereſy was proceeded againſt, was at the common law of two kinds: 1. The convocation or a provincial

(†) Vide *Lindwood de hæreticis, cap.* Finaliter *verb.* ſententiet.

(*) *Godfridus Colonienſis anno* 1234. ſpeaking of the ſeverity of the pope and the emperor *Frederic.* (the author of the conſtitution afore-mentioned for burning heretics) ſays, *Eodem die, quo quis accuſatus eſt ſeu juſtè, ſeu injuſtè, nullius appellationis, nullius defenſionis refugio proficiente, damnatur, & flammis crudeliter injicitur.* See alſo *Mat. Paris, p.* 429.

ſynod. 2. The dioceſan or biſhop of the dioceſe, where the hereſy was publiſhed, and the heretic reſided.

1. As to the former it is without queſtion, that in a convocation of the clergy or provincial ſynod they might and frequently did here in *England* proceed to the ſentencing of hereties, and when convicted, left them to the ſecular power, whereupon the writ of *Hæretico comburendo* might iſſue, (thus it was done in the caſe of the apoſtate *Jew*, *Bract de Coronâ*, *Lib.* III. *(d)*, and in the caſe of *Sawtre (e)*, 2 *H.* 4. who was convict in the convocation of *London*,) and then the archbiſhop, who was *præſes concilii*, pronounced the ſentence, degraded the offender, if in orders, and ſignified the conviction into chancery, whereupon the writ *de hæretico comburendo* iſſued.

2. As to the power of the biſhop or dioceſan alone there hath been diverſity of opininions; ſome have thought, that the biſhop of the dioceſe might proceed againſt hereſy by eccleſiaſtical cenſures, [391] but as to the loſs of life the conviction ought to be at leaſt in a provincial council, without which the heretic ought not to undergo death by the writ *de hæretico comburendo*. 1. For that in the caſe mentioned by *Bracton*, *Lib.* III. *de Coronâ* the conviction of that hereſy, or rather apoſtacy, whereupon the offender was burnt, was in the provincial council at *Oxford*. 2. The writ *de hæretico comburendo* in the regiſter, and *F. N. B.* recites the conviction to be in a provincial council, and according to it is the opinion of *Fitzherbert*, *ibidem fol.* 269. and the ſtatute of 2 *H.* 4. (hereafter mentioned) giving power to the ordinary finally to ſentence an heretic, ſo that death ſhould enſue thereupon, was *novæ juriſdictionis in hac parte introductæ*. Again my lord *Coke*, 12 *Rep. p.* 56, 57. recites this to be the opinion of all the judges in 2 *Mar.* and in effect agreed unto 43 *Eliz.* by Sir *John Popham*, and others, 5 *Rep. Cawdrie's* caſe, *p.* 23. *a. accordant*, and *Brooke* ſeems to accord. 1 *Mar. Br. Hereſy.*

On the other ſide others have holden, that the dioceſan alone by the cannon law might convict of hereſy, and that thereupon this writ may be iſſued: 1. This is conſonant to the old decretals, and likewiſe to the provincial conſtitutions of *Arundel*, *Courtney* and others, that the dioceſan alone without the aſſiſtance of a provincial council might convict of hereſy, and deliver over the offender to the ſecular power. 2. Again, the ſtatute of 2 *H.* 4. *cap.* 15. recites and admits

(d) Lib. III. *cap.* 9. *fol.* 124. *a.*
(e) State Tr. Vol. VI. *Append. p.* 2. *Fox's Acts and Mon. Vol.* I. *p.* 586. *Rymer's Fœd. Vol.* VIII. *p.* 178.

the

the power of the dioceſan in this caſe, but that by reaſon of the offender's going from dioceſe to dioceſe, and refuſing to appear before the ordinary, he was interrupted in his proceeding, and thereupon the ſtatute gives farther remedy. 3 That accordingly it was practiſed in the time of queen *Elizabeth*, when all former ſtatutes concerning hereſy were repealed, and the caſe ſtood as it was at common law. 4. That it was accordingly reſolved by *Fleming*, *Tanfield*, *Williams* and *Croke* in 9 *Jac.* *(f)*, when *Legate* was burnt for hereſy; and accordingly my lord *Coke* *P. C. cap.* 5. *p.* 40. ſeems to be of the ſame opinion *(g)*, and ſo ſeems to retract what he had before delivered in his 12th report. [392]

This buſineſs will be farther conſidered in the ſequel of this chapter, for the preſent I ſhall only ſay thus much.

1. That the dioceſan, as to eccleſiaſtical cenſures, may doubtleſs proceed to ſentence hereſy.

2. I think that at common law, and ſo at this day, (all former ſtatutes being now repealed by 1 *Eliz. cap.* 1.) if the dioceſan convicts a man of hereſy, and either upon his refuſal to abjure, or upon a relapſe decrees him to be delivered over to the ſecular power, and this be ſignified under the ſeal of the ordinary into the chancery, the king might thereupon by ſpecial warrant command a writ *de hæretico comburendo* *(h)* to iſſue, tho this were a matter that lay in his diſcretion to grant, ſuſpend, or refuſe, as the caſe might be circumſtantiated.

And what is here ſaid of the dioceſan or biſhop of the dioceſe is true alſo of the guardian of the ſpiritualties *ſede vacante*, but 'till the ſtatute of 2 *H.* 4. the vicar general, commiſſary, or official of the dioceſan had no cognizance, unleſs by ſpecial commiſſion as an inquiſitor from the pope; and *Lindwood* gives the reaſon *de hæreticis cap.* Item quia turpis *verb.* ordinarii *in gloſſâ*, *Eſt enim cauſa hæreſis una de*

(f) 12 *Co. Rep.* 92.

(g) Lord *Coke* does not intimate as if he was of this opinion, or had retracted what he had ſaid in his 12th report, and had been ſolemnly reſolved in *Cawdrie*'s caſe); he ſays indeed, that from the ſtatute of 2 *H.* 4. may be gathered this concluſion, that the dioceſan hath juriſdiction of hereſy, and accordingly it was reſolved in *Legate*'s caſe, and that upon a conviction before the ordinary of hereſy, the writ *de hæretico comburendo* doth lie; this he mentions as alſo reſolved in *Legate*'s caſe, as in truth it was; but to this laſt reſolution he doth not declare any aſſent, for it is the firſt only, which he ſays may be gathered from the act of 2 *H.* 4.

(h) Whether this writ lay at common law, or was introduced by the clergy about the time of *Henry* IV. hath been made matter of queſtion: ſee *State Tr. Vol.* II. *p.* [275] if the common law gave ſuch a writ; it will be difficult to reconcile it with what our author ſays a little below, that the uſual penalty was confiſcation and baniſhment, and that 5 *R.* 2. was the firſt temporal law againſt hereſy, which yet went not ſo high as death, but only to impriſonment and eccleſiaſtical cenſure.

majoribus cauſis, quæ pertinent ad ſolos epiſcopos; but the ſtatutes of 2 *H.* 4. *cap.* 15. 2 *H.* 5. *cap.* 7. while they were in force, gave the cognizance of hereſy, as well to the biſhop's commiſſary, as the biſhop.

[393] 3. But yet I never find before the time of *Richard* II. that any man was put to death upon a bare conviction of hereſy, tho after a relapſe, unleſs he were ſentenced in a provincial council: and the reaſon ſeems to me to be this, when the offender was convicted of hereſy either thro pertinacity, or after a relapſe, and ſo deliver'd over to the ſecular power, the eccleſiaſtical judge had done his buſineſs, and the reſt that follows was to be the act of the temporal or civil power, who were never obliged nor thought themſelves obliged here in *England* to take away the life of a perſon upon ſo ſlender an account, as the judgment of a ſingle biſhop *(i)*, nor indeed, unleſs it were a ſentence by the weighty body of a provincial council: *vide Bracton, ubi ſupra.*

For as this kingdom was never obliged by the canons or decretals of popes or of provincial councils, further, than they were admitted, ſo neither were they bound by the imperial conſtitutions of the emperor *Frederic* or others, who by their edicts inflict death upon all perſons cenſured by the dioceſan to be relapſed or contumacious heretics; but herein they did as the laws and uſages of the kingdom, and their own prudence, and the circumſtances of the caſe required or directed.

But yet I take it, that the conviction before the dioceſan alone was a good conviction, and the party might thereupon be left to the ſecular power, and ſo burnt by a writ *de hæretico comburendo*, if the king and his council thought fit, tho *de facto* it was not at all, or at leaſt not uſually ſo done, till the time of *Henry* IV. unleſs the conviction and ſentence were in a provincial council, for the reaſon before given.

Fitzherbert therefore was herein miſtaken, and alſo when he ſaith, it was to iſſue only in caſe of relapſe; for a relapſe could not be without conviction, and if the party were thereby convicted of the hereſy, whereof he was accuſed, and perſiſted in it 'till after ſentence, and refuſed to abjure, ſuch a *contumax* or *pertinax hæreticus* might be proceeded againſt as a relapſed heretic, and a writ *de hæretico comburendo* might thereupon iſſue, as it ſeems, for the writ in the regiſter

(i) 12 *Co Rep.* 56.

being

being formed upon a relapſed heretic purſues the caſe as it finds it, but is not excluſive of the other caſe of a contumacious heretic, that perſiſts therein before and after the ſentence; *de quo vide ſupra*; *vide accordant* 1 *Mar. Br. Hereſy* 1. and 25 *H.* 8. *cap.* 14.

Touching the penalty of convicts of hereſy here in *England*, I find very rarely death inflicted; before the reign of *Richard* II. the uſual penalty was confiſcation, and ſeizure of goods; *quod vide Clauſ.* 20. *H.* 3. *m.* 11. *dorſ.* touching *Ernald de Peregard*, who was convict of hereſy, and his goods ſeized to the king's uſe; the like, *Clauſ.* 26 *H.* 3. *m.* 15. *pro Stephano Peliter*, and as to corporal puniſhment of ſuch convicts, it was uſually in antient time baniſhment and ſtigmatizing, as appears by *Ralph de Diceto*, *ſub anno* 1166. in the time of *Henry* II. and *Brompton H.* 2. *ſub anno* 1159. (*), but their conviction was in a provincial council held at *Oxon præſente rege, & præſentibus epiſcopis.*

But *quo jure* the forfeiture of goods was then practiſed, is conſiderable: *vide Co. P. C. cap* 5. the forfeiture of goods was introduced by 2 *H.* 5. and that ſtatute being repealed, ceaſeth.

And in the firſt temporal law, or *pretended* law *(k)* made againſt ſuch offenders, *viz.* 5 *R.* 2. *cap.* 5. where, upon certificate by the prelates into the chancery, commiſſions ſhall iſſue to the ſheriffs to apprehend and impriſon the offender, it is only until they will juſtify themſelves according to the law and reaſon of holy church, ſo that it ſeems the puniſhment did not hitherto *de facto* exceed impriſonment and eccleſiaſtical cenſures; and yet it ſeems that *Swinderly* and others in the time of *Richard* II. before the ſtatute of 2 *H.* 4. were ordered to be executed for hereſy: *vide Fox part* 1. *p.* 580, 618. but none by name appear to be executed, *ibidem p.* 659. but of this hereafter. (†)

As touching the writ *de hæretico comburendo* it was no writ of courſe, nor iſſued by the chancellor, but by ſpecial warrant from the king upon the certificate of the conviction and ſentence made to the king under the ſeal of the archbiſhop, if it were in a provincial council. [395]

(*) See alſo *Mat. Paris, p.* 105.

(k) Our author here calls it a *pretended law*, and lord *Coke* calls it a *ſuppoſed act*, becauſe the commons never conſented to it, for which reaſon in the next ſeſſion of parliament it was annuld, altho by the prelates means it hath been continually printed, and the act, which annuld the ſame, hath been from time to time kept from the print. 12 *Co. Rep. p.* 57.

(†) It does not appear, that any were orderd to be executed for hereſy in this reign, and as to *Swinderby*, Mr *Fox* ſays, he was declared an heretic, but ſuffered no great harm during the life of king *Richard* II. and if he was burnt, it was not till after the ſtatute of 2 *H.* 4. See *Fox's Acts* and *Mon. p.* 620.

And thus far what I find concerning hereſy at common law before the time of *Richard* II.

II. As to the times of *Richard* II. *Henry* IV. *Henry* V. and ſo to 25 *Henry* VIII.

The firſt temporal law, or pretended law againſt heretics in this kingdom, was 5 *R.* 2. *cap.* 5. which did not go ſo high as death, but only to impriſonment and eccleſiaſtical cenſure, as appears by the printed ſtatute; but this was in truth no act of parliament, for the commons never aſſented; and accordingly *Rot. Parl.* 6 *R.* 2. *n.* 52. the ſame is declared by the king and parliament, which it is true, was never printed among the ſtatutes, but is at large recited by Mr. *Fox, part* 1. *p.* 576. and therefore we find no other puniſhment during this king's time, but impriſonment and eccleſiaſtical cenſures.

But in the time of *Henry* IV. the power of the dioceſan was enlarged, *viz.* by the ſtatute of 2 *H.* 4. *cap.* 15. *(l) viz.* the dioceſan hath power given him to arreſt and impriſon perſons ſuſpect of hereſy, till purgation or abjuration, and hath alſo power to fine and impriſon perſons for thoſe offenſes, and eſtreat the fines; and if a perſon be convict of hereſy before the dioceſan and his commiſſaries, and do refuſe to abjure, or having abjured fall into relapſe, ſo that according to the canons he ought to be left to the ſecular court, whereupon credence ſhall be given to the dioceſan or his commiſſaries, then the ſheriff of the ſame county ſhall be perſonally preſent at the preferring of the ſame ſentence, when required by the dioceſan, and ſhall receive the perſon ſentenced, and cauſe him before the people in an high place to be burnt.

[396] This ſtatute gave in effect the whole power to the dioceſan, and upon this account *William Sawtre (m)* after ſentence and degradation in the provincial ſynod of *London* was burnt in the beginning of *Henry* IV.'s uſurpation; the whole proceſs and hiſtory of whereof is delivered by Mr. *Fox* in his acts and monuments, *part* 1. *p.* 674, 675. and yet it is obſervable, this was not done barely by the order of the dioceſan *(n)*, but a ſpecial writ *de hæretico comburendo*

(*l*) This ſtatute was afterwards repeal'd by 25 *H.* 8. *cap.* 14.

(*m*) He was a pariſh-prieſt, firſt of St. *Margaret* of *Lynn* in the county of *Norfolk*, and afterwards of St. *Sythe's* church in *Sythe-lane*, *London*, and was the firſt, who appears to have been executed for formal hereſy in *England*.

(*n*) Nor could it be ſo done, becauſe he was not ſentenced by virtue of the act of *H.* 4. which extended only to convictions before the dioceſan or his commiſſary, whereas *Sawtre* was convicted before the convocation; and even on a conviction before the dioceſan the ſheriff had no power to burn the party convict without a writ, unleſs

burendo iſſued to the mayor and ſheriffs of *London* to perform the ſame, which writ is there mentioned *verbatim*, and is the very ſame, which is recited by *F. N. B. fol.* 269. and was the warrant for the burning of *William Sawtre*.

Now touching this matter we are to obſerve, that the parliament of 2 *H.* 4. began the 20th day of *January in octabis Hilarii*, it continued till the 10th of *March* following, *William Sawtre*, having the year before been convicted for hereſy before the biſhop of *Norwich*, was upon the 22d and 24th of *Febr.* 2 *H.* 4. (which was ſitting the parliament) in the provincial council held in St. *Paul*'s, *London*, convicted and ſentenced, as a relapſed heretic, and an heretic to be puniſhed; this was done in the provincial council before *Thomas Arundel*, archbiſhop of *Canterbury*, as appears by the acts of the regiſtry of *Canterbury* collected by Mr. *Fox*, *part* 1. *p.* 673, 674, 675. upon the 26th of *Febr.* the writ *de hæretico comburendo* was formed and made by the advice of the lords temporal in parliament, which writ bears *teſte* 26 *Febr.* 2 *H.* 4. *per ipſum regem & conſilium in parliamento*, and is entered *verbatim* in the parliament-roll 2 *H.* 4. *n.* 29. and is the very ſame with that in *Fitzh. N. B.* before-men- [397] tioned, and agrees *verbatim* with it; and upon this writ *Sawtre* was burnt, being firſt ſolemnly degraded.

This conviction, ſentence, and writ, tho after the commencement of the parliament, was before the end of that parliament, and conſequently before the ſtatute of 2 *H.* 4. *cap.* 15. paſſed, which paſſed not till the laſt day of the parliament, *viz.* 10 *Martii*; ſo that at that time the offender could not be executed but by writ *de hæretico comburendo*, for the diocеſan had not power by his own immediate warrant to command execution, till that paſſed, which paſſed not, till after the definitive ſentence.

In this parliament there was a petition of the clergy againſt heretics, which was the foundation of the ſtatute of 2 *H.* 4. *cap.* 15. and was granted by the king *de conſenſu magnatûm & aliorum procerûm regni in præſenti parliamento exiſtentium*, with ſome additional clauſes, which were alſo drawn up into the act of 2 *H.* 4. *cap.* 15. but in that anſwer no conſent of the commons appears, and yet the act was

unleſs he was preſent at the pronouncing the ſentence, ſee *State Tr. Vol.* VI. *Append. p.* 1. beſides, as our author obſerves below, this act did not paſs till after *Sawtre* was ſentenced, ſo that how it can be ſaid, that it was upon account of this act that *Sawtre* was burnt, I know not, except it be with regard to the encouragement the clergy might take from the proſpect of its paſſing for anticipating the exerciſe of ſuch a cruel (tho to them deſirable) power.

drawn

drawn up, and proclaimed, and, as it is now printed, is recited to be at the petition of the prelates, clergy and commons of the realm in parliament, and the enacting clauſe is by the king by the aſſent of the ſtates and other diſcreet men of the realm being in the ſaid parliament: this is obſerved by Mr. *Fox* in his *Acts and Monuments*, *part* 1. *p.* 773. whereupon he concludes, that this was no act of parliament, but an act of the king and clergy like that of 5 *R.* 2. before-mentioned, which was declared void, becauſe the commons never aſſented, as is before obſerved.

But the truth is, the commons did aſſent to this act, tho their aſſent be not expreſſed in the parliament-roll as it is entered, as appears in the ſpeech of the ſpeaker of the commons to the king the laſt day of the parliament, *Rot. Parl.* 2 *H.* 4. *n.* 47. where they thank the king for the remedy he had ordained in deſtruction of the heretical doctrine of the ſects; and beſides in the ſame parliament-roll, *n.* 81. " Inter " petitiones communitatis, Item prient les communes, qe quant, aſ-
[398] " cun home ou feme, de qel eſtate ou condition qil ſoit, ſoit " priſe & impriſone per *Lollardie*, qe maintenant ſoit meſn " en reſpons, et eit tiel judgement, come il ad deſervy en example " dautres de tiel male ſect per ligierment ceſſer lour malveys predica- " tions, & lour tenir al a foy chriſtian. Ro'. le Roy le voet.

It is true this was never drawn up into a diſtinct act, for the proviſion by the ſtatute of 2 *H.* 4. *cap.* 15. had a full and effectual proviſion for it; but this petition of the commons with the king's aſſent was the principal baſis, upon which the ſtatute of 2 *H.* 4. *cap.* 15. was built, and the ſtatute was drawn up upon both petitions, as well that of the commons, as that of the clergy both put together, as was uſual in thoſe times, and ſo warrants the recital of the preamble of the printed ſtatute of 2 *H.* 4. of the petition both of the clergy and commons (*), and every man knows, that in the time of *Henry* IV. and afterwards the profeſſors of the chriſtian religion, (that yet for the ſame was ſentenced as heretics,) came under the reproachful title of *Lollards*.

This act of 2 *H.* 4. doth not determine what is hereſy or what not, but leaves it to the deciſion of the dioceſan, which wild and unbounded juriſdiction they had and uſed, till 25 *H.* 8. this therefore was their

(*) This petition of the commons amounts to no more, than that the *Lollards* ſhould be called to an account and puniſhed according to their deſerts, but contains nothing in it, which can be a warrant for ſuch ſevere penalties, as are provided by that act, theſe proceeded from the petition of the clergy.

power

power at common law, and the temporal judge or power was to give credence herein to their ſentence, but yet the conſequence thereof being but to be left to the ſecular power, the ſecular power might exerciſe his own diſcretion, and grant a writ *de hæretico comburendo*, if he were ſatisfied of the juſtice of the ſentence, or forbear the granting it, if he were not ſatisfied, that the thing charged was a real hereſy, or that the eccleſiaſtical judge had proceeded fairly in the caſe. (†)

But there were ſome points of power introduced by this act, and given to the dioceſan, which he had not at the common law, *viz.* [399]

1. Power to arreſt and impriſon perſons ſuſpect of hereſy, for altho the pope's decretals had before this pretended to give power of impriſonment to the dioceſan, *Extr. de pœnis, cap.* 3. *in.* 6*to*, yet that power never obtaind in *England*, till this act of 2 *H.* 4.

2. Power to ſet and eſtreat fines upon the offender.

3. Power to deliver over immediately to the temporal officer a relapſed or contumacious heretic to be burnt without expecting the king's writ *de hæretico comburendo*, with this notable advantageous clauſe *whereupon credence ſhall be given to the dioceſan or his commiſſary.*

And accordingly the biſhops after this act put the ſame in ure by their own immediate warrant or order delivering the party to the ſheriff to be executed; but yet the concluſion of their ſentence ran moſt commonly as formerly, *viz.* appointing him to be left to the ſecular power, and ſo leaves him, but ſometimes, as in the definitive ſentence againſt the lord *Cobham*, *Fox*, *part* 1. *p.* 734. *committing him from henceforth to the ſecular power, and judgment to do him thereupon to death.*

Now it is true, that upon the ſentence of the dioceſan the ſheriff or officer, or any other were not to diſpute, whether the ſame were truly hereſy or not. 1. Becauſe it was an act within their cognizance and juriſdiction. 2. Becauſe it is by 2 *H.* 4. enacted, that credence herein ſhall be given to the dioceſan or his commiſſary.

But yet as to the firſt point of the ſtatute, the impriſoning of perſons ſuſpect of hereſy, the temporal judge had cognizance and power to determine, whether *that* for which the party was impriſoned by

(†) But by the papal conſtitutions this liberty is not allowed to the ſecular power, for by thoſe conſtitutions it is provided, That the puniſhment of heretics muſt not be relaxed or delayed. *Conſtit. Innoc.* IV. *cap.* 24. and 32. *Clem.* IV. *Conſtit.* XIII. and "That all magiſtrates under "the penalty of excommunication muſt "execute the penalties by the inquiſitors "impoſed on heretics without reviſing the "juſtice of them, for hereſy is a crime "merely eccleſiaſtical." *Conſtit. X. Bull. Rom. Tom.* I. *p.* 453.

the

the dioceſan were hereſy or not; and if it appeared to the temporal judge not to be hereſy, tho the dioceſan had certified it to be hereſy, the temporal judge might deliver the party impriſoned upon an *Habeas Corpus*, as was done *M.* 5 *E.* 4. *Rot.* 143. *B. R.* in *Keyſer*'s caſe *(o)*.

[400] and the party detaining him is puniſhable in an action of falſe impriſonment, as was done in *Warner*'s caſe *(p)*, *M.* 11 *H.* 7. *Rot.* 327. both which caſes are at large reported, *Co. P. C. cap.* 5. *p.* 42. and therefore in caſes of ſuch return upon an *Habeas Corpus*, or juſtification by this act in falſe impriſonment, the particular hereſy muſt be ſet forth, what it is, that the temporal judge may judge, whether it be hereſy or no.

By this ſtatute it appears, 1. That the dioceſan might convict of hereſy, and thereupon the party convict be left to the ſecular power, which ſettles the doubt raiſed by *Fitzh. N. B.* 269. 2. That he might convict an heretic, ſo as to ſubject him to the puniſhment of death not only in caſe of relapſe after abjuration, but alſo in caſe of refuſal to abjure. 3. The power of convicting an heretic is not limited to the dioceſan only, but alſo to his commiſſary in order to his execution by the ſecular power.

After this enſued the ſtatute of 2 *H.* 5. *cap.* 7. againſt heretics and *Lollards*, and thereby it is enacted.

1. "That all temporal officers be ſworn to deſtroy all hereſies and "errors, commonly called *Lollardy*, and that they be aſſiſting to the "ordinary, when required, at the ordinary's charge.

2. "That when perſons are convict of hereſy, and left to the ſecu- "lar power by the ordinaries or their commiſſaries, their lands in "fee-ſimple ſhall after their death be forfeit to the king or lords, of "whom they are held, others than the ordinaries and commiſſaries "themſelves, and all their goods.

3. "That the juſtices of the king's bench, of the peace, and aſſize, "ſhall have power to inquire of ſuch errors and hereſies called *Lol-* "*lardy*, and their abetters, *&c.* and make out proceſs of *Capias* "againſt them.

[401] 4. "That ſuch *Lollards* and their indictments be delivered "over by indenture to the ordinaries or their commiſſaries, "who thereupon are to proceed to their acquittal or conviction, but

(o) Keyſer's hereſy was, that being excommunicated by the archbiſhop of *Canterbury*; he ſaid, *that notwithſtanding that, he was not excommunicated before God, for his corn yielded as well, as any of his neighbours,* 10 *H.* 7. 17.

(p) Warner's hereſy was, that he ſaid *he was not bound to pay tithes to the curate of the pariſh, where he dwelt.* 1 *Rol. Rep.* 110. 3 *Co. Inſt.* 42.

"the

" the indictment to be only as an information, not as evidence againſt " the offender, but the ordinaries to commence their proceſs againſt " them, as if there were no indictment.

5. " Puniſhment for eſcapes is by forfeiture of goods and ſeizure " of lands till he returns;" and ſome other proviſions.

This is the firſt law, that gave forfeiture of lands in fee-ſimple of an heretic convict, and executed, and the firſt law, that ſettled the forfeiture of their goods, tho forfeiture of goods were *de facto* uſed before. *(q)*.

Tho in ſome reſpects it enlarged the ordinary's power, yet it may ſeem ſome kind of curb upon them to have an indictment previous, yet I find them not reſtrained from proceeding, tho there were no ſuch previous indictment.

Hitherto there was no limitation or reſtraint, what ſhould be or what ſhould not be hereſy, whereupon death might be inflicted, but the ordinary's power was left arbitrary and unlimited therein.

By the ſtatute of 25 *H.* 8. *cap.* 14. there was a great alteration made as to the point of hereſy.

1. The ordinaries were not to proceed againſt any for hereſy without preſentment or indictment thereof before the king's juſtices, or an accuſation by two lawful witneſſes at the leaſt, and that before any citation or proceſs by the ordinary.

2. That perſons convict by the ordinary of hereſy, and refuſing to abjure, or having abjured relapſing, ſhall be burnt by the king's writ *de hæretico comburendo* firſt had and obtained for the ſame.

3. Tho it do not poſitively limit what only ſhall be hereſy, yet it enacts what ſhall not be accounted hereſy. 1. Speaking againſt the authority of the pope. 2. Speaking againſt ſpiritual laws made by the authority of the ſee of *Rome* repugnant to the laws of this realm, or the king's prerogative, and indeed it was time to make this proviſion, the papal authority being now in a great meaſure taken away by act of parliament. [402]

4. Perſons accuſed of hereſy ſhall and may be letten to bail either by the ordinary, or in their default by two juſtices of the peace.

IV. By the ſtatute of 31 *H.* 8. *cap.* 14. a farther alteration was made touching hereſy.

1. Six articles are declared and enacted, 1. That in the ſacrament of the altar after conſecration there remains no ſubſtance of bread and wine, but the ſubſtance of Chriſt.

(q) Co. P. C. 43

2. That

2. That communion in both kinds is not neceſſary *ad ſalutem*.

3. That prieſts may not marry by the law of God. 4. That vows of chaſtity ought to be kept by the law of God. 5. That private maſs is neceſſary to be continued. 6. That auricular confeſſion is neceſſary to be retained and uſed.

2. That to preach or to declare, or hold opinion againſt the firſt article touching tranſubſtantiation ſhall be adjudged hereſy, and the perſons convict thereof, their aiders, *&c.* convicted thereof in the form underwritten ſhall be adjudged heretics, and ſuffer death by burning without any benefit of abjuration, ſanctuary, or clergy, and ſhall forfeit his lands to the king, as in caſe of high treaſon.

3. That if any openly preach againſt the laſt five articles, and be thereof convict or attaint by the laws underwritten, every ſuch offender ſhall ſuffer death as a felon without benefit of clergy or ſanctuary.

4. That if any perſon publiſh or declare his opinion againſt the five articles laſt mentioned, he ſhall for the firſt offenſe forfeit his goods, the profits of his lands during his life, and eccleſiaſtical promotions, and be impriſoned at the king's will, and upon the ſecond conviction ſhall ſuffer as a felon without benefit of clergy.

5. The king is empowered to iſſue commiſſions directed to the archbiſhop or biſhop of the dioceſe, and the chancellor and others, or three of them, whereof the archbiſhop or biſhop, or chancellor to be one, to take information by oath of twelve men, or the teſtimony of two lawful perſons of all hereſies, *&c.*

[403] 6. The ordinaries within their ſeveral juriſdictions to take information of hereſies, and juſtices of peace, *&c.* to take inquiſitions touching hereſies; theſe informations and inquiſitions to be certified to the commiſſioners above-mentioned.

7. The commiſſioners or any three of them to make proceſs againſt the offenders into all the ſhires of *England* and *Wales*, as in caſe of felony, and upon their appearance ſhall have full power and authority to hear and determine the ſaid offenſes according the laws of this realm and this ſtatute.

8. Commiſſioners or two of them have power to bail perſons, accuſed, till trial.

9. No challenge to be admitted but for malice or enmity, trial of foreign pleas by the commiſſioners, no eſchetes to the lords, with ſome other clauſes.

This

This act, tho it doth not, in expreſs-terms, repeal the ſtatute of 2 *H.* 5. yet it doth in a great meaſure, alter it. 1. In point of juriſdiction; for, here the proceeding to judgment is to be by commiſſioners under the great ſeal, and not by the ordinary or eccleſiaſtical juriſdiction. 2. The offenſe of hereſy now in a great meaſure is made a ſecular offenſe, eſpecially in the five laſt articles which are made felony. 3. Tho the commiſſioners have power to proceed upon accuſations, as well as indictment, yet the trial of the offender was to be by jury, and the words *hear* and *determine*, &c. import the ſame.

Thus the law ſtood until 1 *E.* 6. with ſome ſmall variations in 34 & 35. *H.* 8. *cap.* 1. but by the ſtatute of 1 *E.* 6. *cap.* 12. all the before-mentioned ſtatutes, *viz.* 5 *R.* 2. 2 *H.* 4. 2 *H.* 5. 25 *H.* 8. 31 *H.* 8. 35 *H.* 8. and all other ſtatutes made in the time of *Henry* VIII. concerning religion are repealed. *(r)*

By the ſtatute of 1 & 2 *P.* & *M. cap.* 6. the ſtatutes of 5 *R.* 2. 2 *H.* 4. and 2 *H.* 5. are revived; but the ſtatutes in *Henry* VIII.'s time, repealed by 1 *E.* 6. ſtood ſtill repealed, and thus they continued till 1 *Eliz.* and if there had needed any farther repeal of the ſtatutes of 25 and 31 *H.* 8. beſides what was done by 1 *E.* 6. yet the ſtatute of 1 & 2 *P.* & *M. cap.* 8. *in fine* hath this clauſe, that was never repealed by the ſtatute of 1 *Eliz.* nor any other ſtatute ſince made, *viz.* " That the eccleſiaſtical juriſ- " diction of archbiſhops, biſhops and ordinaries be in the ſame " ſtate for proceſs of ſuits, puniſhments of crimes, and execution " of cenſures of the church, with knowledge of cauſes belonging " to the ſame, and as large in theſe points as the ſaid juriſdiction " was in the 20th year of *Henry* VIII." which doubtleſs repealed all acts made between 20 *H.* 8. and 1 & 2 *P.* & *M.* in derogation or alteration of the eccleſiaſtical juriſdiction, or the ſtyles or forms of their proceeding by *Henry* VIII. or *Edward* VI. [404]

V. I come now to the time of queen *Elizabeth.*

By the act of 1 *Eliz. cap.* 1. there are theſe alterations: 1. The ſtatutes of 1 & 2 *P.* & *M. cap.* 6. 5 *R.* 2. 2 *H.* 4. 2 *H.* 5. are re-

(r) So that the puniſhment of hereſy then ſtood as it was at common law before any ſtatute made againſt it, notwithſtanding which there were ſome examples in this reign of perſons burnt for hereſy, *viz. Joan Bocher* and *George van Parre*, who were put to death much againſt the will of that good king by the over-perſuaſion of archbiſhop *Cranmer*, for which reaſon (as biſhop *Burnet* remarks) what that archbiſhop afterwards ſuffered in the ſucceeding reign was thought a juſt retaliation on him. *Burnet's Hiſt. of Reformation, Vol* II. *p.* 112.

pealed,

pealed, ſo that now the whole juriſdiction touching hereſy ſtands as it did at common law, with ſuch farther additions as are made by that ſtatute of 1 *Eliz.* 2. The queen, her heirs and ſucceſſors to have power to iſſue commiſſions under the great ſeal to exerciſe all juriſdictions ſpiritual and eccleſiaſtical within this kingdom, and to viſit, reform, redreſs, order, correct, and amend all errors, hereſies, ſchiſms, *&c.* which by any ſpiritual or eccleſiaſtical power can or may be lawfully reformed. 3. That ſuch commiſſioners ſhall not have power to determine any matter to be hereſy, but only ſuch as have been heretofore determined to be hereſy: 1. By the authority of the canonical ſcriptures. 2. Or by any of the firſt four general councils, or any other general council, wherein the ſame was declared hereſy by the expreſs and plain words of the ſaid canonical ſcriptures. 3. Or ſuch as ſhall hereafter be determined hereſy by parliament with the aſſent of the clergy in their convocation.

Upon this ſtatute theſe things are obſervable:

1. By this ſtatute the ancient common law was revived for the conviction of heretics, and delivering them over to the ſecular power, [405] which might at common law be done either in a provincial council, or by the dioceſan alone, and accordingly, it is ſaid *Co. P. C. cap.* 5. *(ſ)* the conviction of heretics was practiſed in the queen's time, but I find no particular inſtance thereof in the queen's time *(t)*, but in the caſe of *Legat*, 9 *Jac.* it was ſo reſolved by four judges, and accordingly put in ure, and upon ſuch a conviction before the dioceſan a writ *de hæretico comburendo* might and did iſſue in the caſes of *Legat* and *Wightman* convict of *Arianiſm* before the dioceſan and left to the ſecular power, who were accordingly burnt *(u)*: *vide Baker's Chronicle, p.* 446.

2. There was another method of conviction of hereſy, and thereupon delivering over to the ſecular power, and execution of the offender by writ *de hæretico comburendo*, namely by ſentence of the commiſſioners for eccleſiaſtical cauſes inſtituted by the ſtatute of 1 *Eliz.* but this takes not away the conviction of hereſy by the dioceſan or in a provincial council, but theſe remain as they did at common

(ſ) *p.* 40.

(t) That is of a conviction in a provincial council, or before the dioceſan alone, for of convictions before the commiſſioners ſome inſtances are here mentioned by our author.

(u) But yet ought not to have been ſo by law, according to the opinion of lord *Coke*, for that the ſtatute of 2 *H.* 4. *cap.* 15. which gave the writ *de hæretico comburendo* was repealed, and at common law no ſuch writ lay upon a conviction by the ordinary, 5 *Co. Rep.* 23. *a.* 12 *Co. Rep.* 56. 92.

law, and thus it was done 17 *Eliz.* upon *John Peters* and *Henry Dirwert (x)*, *Flemings*, convict of hereſy before the commiſſioners for *Anabaptiſm*, and thereupon a writ *de hæretico comburendo* iſſued.

3. That this act reſtored the iſſuing of a writ *de hæretico comburendo (y)* according to the courſe of the common law againſt a man convict of hereſy, and refuſing to abjure, or having abjured relapſed, and thereupon delivered to the ſecular power.

And *note*, that this writ is no writ of courſe, nor can the chancellor or keeper iſſue this writ upon a *ſignificavit* by the commiſſioners or dioceſan without a ſpecial warrant, for that the king may ſee cauſe to ſuſpend the iſſuing thereof, or wholly ſuperſede it, or pardon the ſentence, for it may ſo fall out, that the dioceſan hath adjudged a thing to be hereſy, or a party to be an heretic, which in truth and reality is not ſo, or it may be the party [406] may retract, and ſo be capable of mercy.

But the courſe was for the dioceſan alone, if the conviction were ſingly before him, or for the dioceſan with the conſent of the commiſſioners, if the conviction were before them, by *ſignificavit* under the ſeal of the dioceſan to return the conviction into the chancery, and then the ſame is brought before the king and his council, and after deliberation by the king with his council, a ſpecial warrant iſſues from the king by the advice of his council, to the chancellor or keeper, together with the tenor of the writ *de hæretico comburendo* expreſſed in the warrant, and commanding the chancellor or keeper to iſſue it under the great ſeal, which warrant is filed for the keeper's indemnity: this was the form which was uſed 17 *Eliz.* in the caſe of the *Anabaptiſts* above-named; and *note*, altho the conviction were before the commiſſioners, yet the dioceſan was one of the commiſſioners, and his ſeal to the *ſignificavit*, ſo that there were the junctures of both authorities, *viz.* the authority of the dioceſan according to the courſe of the common law, and of the commiſſioners according to the power given by the ſtatute of 1 *Eliz.* and we have reaſon to believe, that the ſubſequent convictions in the queen's time purſued this form, and poſſibly that of *Legat's* in 9 *Jac.* might be in the ſame nature, tho the reſolution of the judges, upon which it ſeems the proceſs was formed, takes notice only of the dioceſan.

(x) Their names were *John Wielmacker* and *Hendrick Ter Woort*.

(y) The act ſays nothing about this writ one way or other, but only repeals the ſeveral ſtatutes relating to hereſy, and ſo leaves the matter, as it was at common law.

4. That the forfeiture of goods or lands by conviction of hereſy is by this act repealed.

5. Here is the firſt boundary, that was ſet to the extent of hereſy as to the matter thereof, what only ſhall be adjudged hereſy (z); and altho this clauſe refers expreſly only to the commiſſioners, yet it is to be the meaſure and rule for dioceſans, and the convictions in their proceedings againſt heretics.

[407] But it is true, it is not ſo particular and certain, as might have been wiſhed, for according to the inclination of the judge poſſibly ſome would determine *that* to be hereſy by the canonical ſcriptures, which poſſibly is not at all hereſy, nor contrary to the canonical ſcriptures but howſoever it brought hereſy to a greater certainty than before.

Upon this ſtatute of 1 *Eliz.* theſe things ſeem to me to be true: 1. That the *ſignificavit* of the conviction of hereſy ought to contain, even at common law, the particular hereſy, whereof the party was convict, and without ſuch particular *ſignificavit* no writ *de hæretico comburendo* ought to iſſue; and the reaſons are, 1. Becauſe it concerns the higheſt temporal intereſt that any man can have, namely his life, and for this reaſon even in ſmaller temporal concerns a general cauſe or return of hereſy or criminouſneſs is not ſufficient; it is not a ſufficient cauſe of refuſal or non-admiſſion of a clerk to allege, that he is *criminoſus & non idoneus*, or that he is *ſchiſmaticus inveteratus* 5 *Co. Rep.* 58 *a Specot*'s caſe, and the reaſon is very well given, *coment que nappent al court la roygne a determiner ſchiſmes ou hereſies, uncore l'original cauſe del ſuit eſteant matter, dont le court le roy ad conuſance, le cauſe del ſchiſme ou hereſie, purque le preſentee eſt refuſe, covient eſtre alledge en certain al entent le court le roy poit conſult ove divines a ſeaver, ſi ceo ſoit ſchiſme ou nemy*; and upon the ſame reaſon it is, that in *Keyſer*'s caſe upon an *Habeas Corpus*, and *Warner*'s caſe upon a falſe impriſonment, that altho the ſtatute of 2 *H.* 4. enable the ordinary to arreſt for hereſy, it is not a ſufficient return or juſtification to ſay the party was an heretic, or ſuſpect of hereſy, but he muſt return the particular hereſy, for which he was ſo arreſted, that the court may judge upon it; and tho the temporal court hath no

(iz) And great cauſe there was for this limitation, as appears from the fore-mentioned caſes of *Keyſer* and *Warner*, and others, 12 *Co. Rep.* 58. altho, as our author ſays, there ſtill is too great a latitude left, ſince it is unavoidable, but different interpretations will in many caſes be put even upon ſcripture, ſo long as the uſe of reaſon and liberty of thought continues.

original

original cognizance of hereſy, yet it being incident to a temporal intereſt, namely the liberty of a man's perſon, the temporal court ſhall judge, whether it be hereſy or no (*); and accordingly in thoſe caſes they did adjudge that to be no hereſy, which the biſhop returned as an hereſy, and in one caſe the priſoner was [408] diſcharged, and in the other caſe recovered by an action of falſe impriſonment. *Co. P. C. cap.* 5. 2. Altho hereſy be a caſe of eccleſiaſtical cognizance and juriſdiction, and as long as it only concerns eccleſiaſtical cenſures, and (ſo far forth only) faith is to be given to them, 'till reverſed by appeal, yea altho it ſhould in the ſentence itſelf moſt evidently appear, that it was not hereſy, yet as to the inflicting of death at common law they had no power, but all they could do was to commit him to the ſecular power, their buſineſs was then at an end; but now begins the concern of the ſecular power, and herein they were not, as lacqueys, only to follow what the eccleſiaſtical judge had done, for now the life of a ſubject was concerned either to be taken away or not, and that merely by the ſecular power, and herein the ſecular power had a judgment of diſcretion of their own, which they are to exerciſe, but yet cannot do it, unleſs the ſpecial matter of the hereſy be certified to them.

2. Admit a general certificate without ſhewing the particular cauſe of hereſy were good at common law, yet ſince the ſtatute of 1 *Eliz.* it muſt be particular, becauſe an act of parliament, which belongs to the interpretation of the common law, directs what ſhall be hereſy and what not, and the king and his council are to give the warrant for iſſuing the writ, and therefore muſt be aſcertained, whether it be an hereſy within the deſcription of this act, and the chancellor or keeper of the great ſeal is to affix the ſeal and iſſue the writ, and therefore ought to be ſatisfied by the *ſignificavit*, that it is an hereſy within that act, and if he be not, he is not to ſeal it, for it concerns the life

(*) This is certainly agreeable to the law of the land, 2 *Co. Inſtit.* 615, 623. altho it be what the clergy have always diſreliſhed, who never liked to ſubmit their proceedings to the judgment of the king's courts, or of any authority but what was eccleſiaſtical, accordingly we find a decree of *Boniface* V. "Whereby all powers, lords "temporal, and rectors with their officers "are forbid to judge or take cognizance "of hereſy, it being merely eccleſiaſtical, "or to refuſe to execute the puniſhments "enjoined by them, or any way directly "or indirectly to hinder their proceſs or "ſentence under the pain of excommuni"cation, which if they obſtinately lie "under for a year, they are to be con"demned as heretics;" *Sext. decretal. l.* 5 *tit.* 2. *cap.* Inquiſitionis negotium: this decree is confirmed by the general council of *Conſtance, ſeſſ.* 25. See the conſtitutions of archbiſhop *Boniface*, *cap.* de impetrantibus prohibitiones, &c. *cap.* de malitia judicis ſecularis, &c. & *cap* de pœna impedientium, &c. See alſo archbiſhop *Bancroft's* objections, 2 *Co. Inſtit.* 601, 609, &c. *Codex Leg. Eccleſiaſt. Anglic. p.* 1066. *Præf. to Codex, p.* 19.

of a ſubject; theſe are not bare miniſterial acts by the king and his council or chancellor in ſubſervience to the eccleſiaſtical juriſdiction, but they are acts judicial, where they are to exerciſe both a legal and well warranted diſcretionary judgment, and therefore muſt have the cauſe before them upon the *ſignificavit*, and not by a bare general ſtory of a conviction of hereſy, and therefore if upon the return of the *ſignificavit*, whereby the party is convict and ſentenced either as an obſtinate or relapſed heretic, it ſhall, by the particularity of the return, appear, that it is not hereſy, there ought no warrant to be granted for the iſſuing of the writ, and if granted, yet the writ ought not to be ſealed, and therefore the certificate or *ſignificavit* muſt be ſpecial and certain. (*)

Again, this definition or circumſcription of hereſy is by an act of parliament. and tho the matter of it, *viz. Hereſy*, be of eccleſiaſtical cognizance, yet the interpretation of the act of parliament is of a temporal cognizance, eſpecially where a temporal intereſt, and the greateſt temporal intereſt in the world, namely life, is concerned: we have many acts of parliament, that concern matters of eccleſiaſtical cognizance, as touching clergy and purgation, touching matrimony and the prohibited degrees, yet when theſe acts of parliament come to be expounded, the temporal judge hath the cognizance of them.

The ſtatute of 2 *H.* 4. hath two notable clauſes, one whereby the ordinary hath power to arreſt for hereſy, there is in that clauſe no expreſs proviſion, that credence ſhall be given to the ordinary and therefore if he arreſt for that, which is not hereſy, the arreſt is unlawful, and as an incident to an intereſt at common law, *viz.* the liberty of the ſubject, the temporal court hath power to determine, whether it be hereſy or not, as is above-ſhewn: the other clauſe is a power committed to the ordinary to deliver over the party convict to the ſheriff to be executed without any writ *de hæretico comburendo*. This was introductory of a new law, and therefore the ſheriff or officer might poſſibly ſcruple not only whether there were ſuch a ſentence (*a*), but whether the thing, for which the

[410]

party

(*) The ſame reaſoning holds in granting the writ *de excommunicato capiendo*, for that affecting the liberty of a man's perſon, concerns a temporal intereſt.

(*a*) There could be no room for this ſcruple, becauſe, unleſs the ſheriff was preſent at pronouncing the ſentence, the ordinary had no power by 2 *H.* 4. to deliver the heretic to the ſheriff, nor could the ſheriff proceed to execute him without a writ.

party was condemned as an heretic, were really hereſy; but to avoid all difficulties of this kind this unuſual clauſe is added, *that herein credence ſhall be given to the dioceſan or his commiſſary.*

We are here in the caſe of an act of parliament, an act that introduceth a new circumſcription of hereſy, an act that concerns the life of the ſubject, in a buſineſs, which after the ordinary hath paſſed his ſentence, is now wholly left to the king, who, tho he be ſupreme in matters eccleſiaſtical as well as temporal, yet in the iſſuing of his writ *de hæretico comburendo* is looked upon by the eccleſiaſtical judge, as acting by his ſecular power, for that is the concluſion of the ſentence, *viz. that he be left to the ſecular power*, in this he acts not miniſterially but judicially, and therefore upon all accounts muſt have a certain return of the cauſe of the hereſy, and if it ſhall appear to him, or to the chancellor, that is to ſeal the writ, that the return contains not any certainty of the hereſy, or that which is returned as an hereſy, be not ſuch as is deſcribed by the ſtatute of 1 *Eliz.* no writ *de hæretico comburendo* ought to iſſue, whether the conviction be by the high commiſſion, or dioceſan, or convocation. *(b)*.

Blacks. Com. Lib. iv. ch. 4. p. 43, 44. &c. 1 Hawk. P. C. ch. 23.

(*b*) Since our author wrote, altho no alteration has been made in the definition of hereſy, which ſtill ſubſiſts upon the foot of the ſtatute of 1 *Eliz.* yet the ſeverer part of the puniſhment is taken away, and the doubt removed, whether the party be liable to a writ *de hæretico comburendo*, for by 29 *Car.* 2. *cap.* 9. this writ and all proceedings thereon, and all capital puniſhments in purſuance of eccleſiaſtical cenſures are utterly aboliſhed and taken away, ſo that hereſy is now puniſhable only with excommunication, (except in the caſe of a clergyman, who is alſo to be deprived and degraded;) the civil effects of which are, that the party communicated is diſabled from making a will *Swimb. of Wills, part.* 2. §. 22. or from ſuing for any debt or legacy, *Ibid. part* 5. §. 6. or doing any legal act, *Co. Lit.* 133. *b* and if the party do not ſubmit within forty days after publication, upon a *ſignificavit* into chancery, there iſſues a writ *de excommunicato capiendo*, by virtue of which he may be arreſted and detained in priſon, till he do ſubmit; ſo that there ſeems now to be no material difference between a ſimple heretic and a relapſed heretic, for encommunication not being a definitive ſentence, but only a proceſs for contempt to inforce obedience to the ſentence, whenever the party complies with it by retracting, doing penance, *&c.* altho a relapſed heretic, he is to be abſolved.

CHAP. XXXI.

Concerning homicide *and firſt of* ſelf-killing *or* felo de ſe.

HAVING gone thro the pleas of the crown touching high treaſon, miſpriſion of treaſon, and petit treaſon, the order that I have propoſed leads me to conſider of felony, &c. and theſe are of two kinds, felonies by the common law, and felonies made ſuch by act of parliament.

Felonies by common law are ſuch, as either concern the taking away of life, or concern the taking away of goods, or concern the habitation, or concern the obſtruction of the execution of juſtice in criminal and capital cauſes, as eſcapes, reſcues, &c.

In the firſt place therefore come to be conſidered thoſe felonies or offenſes, that relate to life or the taking away thereof without due proceſs of law, and this again is either that, which concerns the loſs of life happening to a man's ſelf, or happening to another.

As to the firſt of theſe, namely the conſideration of that offenſe or crime, that concerns a man's own life, where there is no other offender but the ſufferer, this falls under theſe two heads or diviſions

I. *Homicidium ſui-ipſius*, or felony of a man's ſelf.

II. *Infortunium*, or pure accident, or at leaſt, where no other reaſonable creature is concerned in the effecting of it.

Of the former of theſe in this chapter.

Felo de ſe or *ſuicide* is, where a man of the age of diſcretion, and *compos mentis*, voluntarily kills himſelf by ſtabbing, poiſon, or any other way.

No man hath the abſolute intereſt of himſelf, but 1. God almighty hath an intereſt and propriety in him, and therefore ſelf-murder is a ſin againſt God. 2. The king hath an intereſt in him, and therefore the inquiſition in caſe of ſelf-murder is *felonicè & voluntariè ſeipſum interfecit & murderavit contra pacem domini regis.*

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Co. Litt. §. 194. *fol.* 127. *a*, *M.* 11. *Jac. Wright*'s caſe, a man to the intent to make himſelf impotent, and thereby to have the more colour to beg, cauſed another to ſtrike off his hand, for this they were both indicted, fined and ranſomed.

A man or woman as to capital offenſes is *of the age of diſcretion* at fourteen years old: *vide quæ ſupra dicta ſunt cap.* 3.

Compos mentis.

If

If he loſe his memory by ſickneſs, infirmity, or accident, and kills himſelf he is not *felo de ſe*, neither can he be ſaid to commit murder upon himſelf or any other.

If a man gives himſelf a mortal ſtroke, while he is *non compos*, and recovers his underſtanding, and then dies, he is not *felo de ſe*, for tho the death complete the homicide, the act muſt be *that*, which makes the offenſe.

P. 22 *E.* 3. *Coron.* 244. *Co. P. C.* 54. *vide ſupra cap.* 4. who ſhall be ſaid *non compos*.

It is not every melancholy or hypochondriacal diſtemper, that denominates a man *non compos*, for there are few, who commit this offenſe, but are under ſuch infirmities, but it muſt be ſuch an alienation of mind, that renders them to be madmen or frantic, or deſtitute of the uſe of reaſon: a lunatic killing himſelf in the fit of lunacy is not *felo de ſe*, otherwiſe it is, if it be at another time.

What a *voluntary killing*.

If a man voluntarily give himſelf a mortal wound, and die within a year and a day of that wound, he is *felo de ſe*, and he cannot purge the crime, nor the forfeiture inflicted by the law, by his repenting of what he had done. 8 *E.* 4. 4.

It muſt be ſimply voluntary, and with an intent to kill himſelf.

If *A.* with an intent to prevent a gangrene beginning in his hand doth without any advice cut off his hand, by which he dies, he is not thereby *felo de ſe* for tho it was a voluntary act, [413] yet it was not with an intent to kill himſelf.

It is ſaid *Co. P. C. p.* 54. and by Mr. *Dalton*, *cap.* 92. *(a)*, that if *A.* gives *B.* a ſtroke, that he falls to the ground, *B.* draws his knife and holds it up for his own defenſe, *A.* in haſte falling upon *B.* to kill him, falls upon the knife, whereby he is wounded to death, *A.* is *felo de ſe*, and for that they cite 44 *E.* 3. 44. 44 *Aſſ.* 17. where indeed it is adjudged, and that rightly, that *B.* is not guilty, and ſhall not forfeit his goods, and that it is not barely *ſe defendendo*, for he did not ſtrike, only held up his knife, and ſo is ſimply not guilty; and all that *Knivett* ſays is, *Eſt trove, que le mort occiſe lui meſme*, and adjudged that *B.* is not guilty, nor his goods forfeit: but *Knivett* ſays not, that *A.* is *felo de ſe*, neither indeed is he, but it is only *per infortunium*.

But if *A.* had ſtricken at *B.* with a knife intending to kill him, and miſſing *B.* had ſtricken himſelf, and killed himſelf, there he had been

(a) New Edit. 1727. *cap.* 144

felo de ſe, becauſe that act, whereby he intended to murder *B.* ſhall have the ſame conſtruction, if it kills himſelf or any other perſon, as it ſhould have done, if it had taken its effect upon *B. de quo infra.*

Touching the forfeiture of *Felo de ſe.*

He doth not forfeit his lands nor his wife's dower.

But he doth forfeit his goods and chattels.

As to the relation of the forfeiture.

Baron and feme joint purchaſers of a term for years, the huſband drowns himſelf, the leaſe is forfeited, and the wife ſurviving ſhall not hold it againſt the king or almoner, *Plowd. Com.* 260. *b. Dy.* 108. Dame *Hale*'s caſe, in which all the judges agreed, but ſeem to intimate different reaſons: *Weſton* held the relation was only to the death, but the title of the king and a common perſon coming together, the king's title ſhall be preferred, but yet they concluded, that the forfeiture relates to the firſt act, whereby the felony was committed, namely the throwing himſelf into the water, and ſo the king's title commenced in the life of the huſband, and amounted to a forfeiture in his life-time, when by law it was in his power, either by his diſpoſal or forfeiture, as by outlawry, to bind the intereſt of the wife, and therefore they ſay, that if a villain gives himſelf a mortal wound, and the lord ſeizes the goods, and then the villain dies of the wound, the king ſhall have the goods againſt the lord, and with this agrees *Littleton*, 8 *E.* 4. 4.

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That the law was well reſolved in that caſe I do not doubt, but I am not ſatisfied, that the relation of the forfeiture is to the time of the ſtroke to all purpoſes, no more than in caſe of another felony, for ſuppoſe a man ſhould give himſelf a mortal ſtroke and live eleven months after, how ſhall he ſupport himſelf and his family?

But whereas in other caſes of other felonies the forfeiture as to goods relates neither to the ſtroke, nor to the death, but to the conviction, here the forfeiture relates not barely to the preſentment or inquiſition, but to the death in caſe of a *felo de ſe*, for being his own executioner he prevents any formal conviction, as in other felonies.

But yet in order to this forfeiture it is neceſſary, that there ſhould be a record to entitle the king, *viz.* an inquiſition.

Inquiſitions therefore in this caſe are of two kinds, *viz.* if the body cannot be ſeen, then it is inquiſible before the juſtices of *oyer* and *terminer*, yea or before the juſtices of peace of the county, for it is a felony, and within the extent of their commiſſion, *H.* 37 *Eliz. B. R. Laughton's*

Laughton's caſe, *Co. P. C. p.* 55. *(b)*, and accordingly adjudged *M.* 1656. in *Greeve*'s caſe.

And ſo if an indictment of felony be before commiſſioners of *oyer* and *terminer* or goal-delivery, *&c.* and a *fugam fecit* be preſented, if proceſs be made againſt thoſe, that have the goods, the flight may be traverſed, for it is but an inqueſt of office, and ſhall not conclude. 47 *E.* 3. 26.

But it is there held, that if an inquiſition be taken before the coroner *ſuper viſum corporis*, that a man is *felo de ſe*, that inquiſition ſhall be concluſive, and is not traverſable by the executors or adminiſtrators of the deceaſed, *Co. P. C. p.* 55. and the like ſeems to be held by *Stamford, P. C. p.* 183. *b.* where a *fugam fecit* [415] is preſented before the coroner *ſuper viſum corporis*, where it is found, that a murder was committed, and the murderer fled; and yet the offender himſelf ſhall be received to plead not guilty to the indictment or inquiſition before the coroner, as by daily experience it appears, tho *Stamford* makes it there a queſtion whether the *fugam fecit* be traverſable.

And therefore I remember in the king's bench in the caſe of *Barclay* it was ruled, that in caſe of an inqueſt before the coroner *ſuper viſum corporis*, wherein the party was found *felo de ſe*, the inquiſition was quaſhed in the king's bench, becauſe upon examination it appeared, that the coroner refuſed to let the jury hear witneſs on the part of him that was dead, to prove that he was not *felo de ſe*, for the coroner ought to hear evidence on both ſides, partly becauſe it was doubted, that the inquiſition in this caſe was concluſive, and a conviction, and not traverſable, and the court of king's bench, who are the ſovereign coroners, did ſet aſide that inquiſition, and order the coroner to inquire *de novo ſuper viſum corporis*, becauſe the body was yet to be viewed. *H.* 1658. *B. R. Barclay*'s caſe. *(c)*

If an inquiſition be taken before the coroner *ſuper viſum corporis*, whereby the party dead is found to have died *per infortunium*, if it is ſuggeſted on the part of the king or almoner, that he was *felo de ſe*, and in the king's bench a writ of *melius inquirendum* is prayed to the ſheriff, it ſeems it ought not to be granted, becauſe the coroner is the proper officer, and accordingly it was denied in *Paſch.* 24 *Car.* 2. and if granted, and an inquiſition taken, it hath been held void *(d)* by the ſtatute of 28 *E.* 3. *cap.* 9. tho many precedents of ſuch writs are ex-

(*b*) *In Margine.* (*c*) 2 *Sid.* 90, 101. (*d*) 2 *Ander.* 204.

tant.

tant. *H.* 37 *Eliz. B. R. Croke, n.* 13. *Harleſton's* caſe, *F. N. B.* 144, 250. *(e)*

But it ſeems, if the coroner's inquiſition omit the finding of the goods of the *felo de ſe*, that may be ſupplied by a writ of *melius inquirendum* directed to the ſheriff, for that is not within the ſtatute of 28 *E.* 3.

[416] But whenſoever any inquiſition is taken by the ſheriff by a writ or commiſſion of *melius inquirendum*, without queſtion that inquiſition is traverſable.

If an inquiſition be taken before the coroner *ſuper viſum corporis de villis A. B. C.* and *D.* and ſays not *de quatuor villatis proximè adjacent*, according to the ſtatute of 4 *E.* 1. *de coronatoribus (f)*, yet it hath been held the inquiſition is good, becauſe the ſtatute is only directory. *H.* 1658. *B. R. Barclay's* caſe. *(g)*

But altho an inquiſition taken before the coroner *ſuper viſum corporis*, in the point of *felo de ſe* is of great authority and a ſufficient record, whereupon proceſs may be made againſt thoſe that detain the goods found in the inquiſition, yet it ſeems to me, that it is traverſable in the very point ſo found, for it is but an inqueſt of office, and whereupon the party grieved thereby can have no attaint, but otherwiſe it is of a preſentment of a *fugam fecit* before the coroner. 8 *E.* 4. 4.

The coroner hath power *ſuper viſum corporis* to inquire touching the murder or interfection of the party that is dead, and alſo of all acceſſaries before, and of their flight, but not of acceſſaries after the fact, 4 *H.* 7. 18. *b. (h)*, yet the party preſented before the coroner to be principal or acceſſary before is not convict by ſuch preſentment, but ſhall be arraigned and plead to the felony, and I know no difference between that and this; and it ſeems unreaſonable, that by an inqueſt taken againſt a dead perſon, whereby he is found *felo de ſe*, that the executors, adminiſtrators, legatees, and children of the deceaſed ſhould be concluded and loſe the goods of the deceaſed without an anſwer, by an inquiſition which may be taken by the coroner behind

(e) Edit. 1718. *p.* 322, 554.

(f) This ſtatute was but an affirmance of the common law. *Brit.* 7. *a.*

(g) 2 *Sid.* 144. See alſo the *King* verſus *Creſſe*, &c. 1 *Sid.* 204.

(h) This caſe ſays nothing directly of the coroner's power to inquire of acceſſaries, yet by reſolving, that in caſe of an acceſſary before the fact preſented before the coroner, if it was found he fled, he ſhould forfeit his goods, but not ſo in caſe of an acceſſary after the fact, it ſeems ſtrongly to imply, that the coroner had juriſdiction in the one caſe, but not in the other; and *Stamford* ſays, that the judges in that caſe of 4 *H.* 7. abridged the coroner of a power, which he would have uſurped in inquiring of thoſe, who were acceſſaries after the murder. See to this purpoſe *Daliſon* 32.

their

their backs, and I find no book expreſs in it, but the opinion of my lord *Coke P. C.* 55. *(i)*, for the doubt of Mr. *Stamford P. C.* 183. is only upon a *fugam fecit*, and in the caſe of *Barclay* 1658. the court of king's bench were not ſatisfied, that it was concluſive.

P. 45 *E.* 3. *inter communia ſcaccarii* there was a preſentment (before the coroner, as it ſeems, but it is not ſo expreſſed in the record) that *Walter Page felonicè ſe ſubmerſit, & ſic félo de ſe devenit*, and thereupon a writ iſſued out of the exchequer to inquire what debts were due to *Walter Page*; the ſheriffs of *London* took an inquiſition, whereby it was found that *Simon Long* of *Eſſex* was indebted to *Walter Page* at the time of his death in 40*l.* by bill, thereupon proceſs iſſued againſt *Simon Long* to anſwer the debt, who came in and confeſſed he owed the debt to *Walter Page*, *dicit tamen, quod domino regi reddere non debet, quia qualitercunque præſentatum fuit, quod dictus* Walterus Page *nequiter & felonicè ſe ſubmerſit, ut prædicitur, idem* Walterus Page *interfectus fuit per emulos ſuos, & per ipſos in quodam foſſato in loco vocato* the wilds *in com.* Surrey *projectus, abſque hoc, quod ipſe aliqualiter ſe ſubmerſit*; and thereupon iſſue was joined, and by a jury of *Surrey* found, *quod dictus* Walterus Page *fuit interfectus per emulos ſuos, & in foſſato projectus, abſque hoc, quod ipſe aliqualiter ſe ſubmerſit.*

There a traverſe was taken to the preſentment, which muſt needs be before the coroner by the whole circumſtance of the caſe, tho the coroner be not mentioned in the record.

And with this agrees the book of 8 *E.* 4. 4. that the finding of one to be *felo de ſe* is traverſable, tho found before the coroner; but indeed it holds, that a *fugam fecit* preſented before the coroner is not traverſable, *quia auntient ley de corone. (k)*

If there be two coroners in a county, the outlawry muſt be given by both, *utlagatus eſt per judicium coronatorum*, yet one of them may take an inquiſition *ſuper viſum corporis*, *M.* 6 & 7 *Eliz. C. B. (l)*.

By the ſtatute of 3 *H.* 7. *cap.* 1. the coroner ought to return and certify the inquiſitions taken by him to the next [418] goal-delivery, or into the king's bench.

And thus far touching *felo de ſe* and his forfeiture.

There is another kind of death of a man, which may be conſiderable in this place, namely the death of a man *per infortunium*, and this is of two kinds, *viz.*

(i) See alſo to the ſame purpoſe *Hob.* 347.

(k) See *Stamf. Prerog.* 46. *b.*

(l) See *Hob.* 70.

1. Where

1. Where one man is the cauſe of another man's death without any ill intent, and by misfortune: of this I ſhall treat under the diſtribution of homicide.

2. When a man comes to an untimely end, where no other reaſonable creature concurs to it, and this is properly *per infortunium.*

As where a man falls from an horſe, or houſe, or boat, or into a pit, or a tree or tile fall upon him and kill him, or is killed by a beaſt, in this caſe the coroner ought to take an inquiry *ſuper viſum corporis*, and alſo of the manner and means, how he came by his death, and of the thing, whereby it happened, and of the value thereof, becauſe in many caſes there is a forfeit belonging to the king as a deodand, whereof in the next chapter.

4 Blackſ. Com. ch. 14. p. 189, 190. Burn. tit. Homicide. ſect. 6. ſelf-murder. 1 Hawk. P. C. ch. 27. and Foſter's Diſcourſe on Homicide, per tot.

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CHAP. XXXII.

Of deodands.

REGULARLY that moveable good, that brings a man to an untimely death, is forfeit to the king, and it is uſually granted by the king to his almoner to diſtribute in charitable uſes.

But they are not forfeit till the death be found, which is regularly by the coroner, and may be before the commiſſioners of goal-delivery, *oyer* and *terminer*, or of the peace, if omitted by the coroner, and hence it is, that theſe goods, as neither the goods of felons of themſelves, felons and other outlawed perſons, cannot be claimed by preſcription, becauſe there muſt appear a title to them by matter of record, before they are forfeited.

Upon the death of a man by miſadventure, *&c.* the inquiſition ought to inquire of the goods, that occaſioned the death, and the value of them, and the *Villata*, where the miſchance happened, ſhall be charged with proceſs for the ſaid goods or their value, tho they were not delivered to them *(a)*, 3 *E.* 3. *Cor.* 298.

And this is the reaſon, that in every indictment of murder, manſlaughter, *&c.* the indictment finding, that he was killed with a ſword,

(*a*) This caſe is cited from an *Iter*, by *Fitzherbert*, who adds at the end of it, *quod mirum.*

ſtaff,

ſtaff, &c. ought to find alſo the price, *viz.* 5 *ſolidorum*, becauſe the king is intitled to that inſtrument, whereby the party was killed, or the value thereof, and that, altho it were the ſword of another man, and not his, that gave the ſtroke, *Co. P. C.* 57, 58. tho this doth not vitiate the indictment as to the offenſe itſelf, tho the price be omitted.

Deodands are of two natures: 1. Such as do *movere ad mortem*. 2. Such as, tho they are *quieſcentia*, yet occaſion [420] the party's death: *vide* ſtatute 4 *E.* 1. *de officio coronatoris.*

1. Things moving to death: as if a beaſt kills a man, 8 *E.* 2. *Coron.* 403. if a man be cutting of a tree, and the tree falls upon another tree and breaks down a limb, which falls upon a man and kills him, both the limb, and the tree that fell, are deodands. 8 *E.* 2. *Coron.* 398.

If a man be driving of a cart, and the cart fall and kill a man, the cart and horſes are a deodand. 8 *E.* 2. *Coron.* 388. and ſo if a cart run over a man and kill him, the cart and horſes are forfeit, 8 *E.* 2. *Coron.* 403. 3 *E.* 3. *Coron.* 326, 342. *(b)*, ſo if the timber that hangs a bell, fall and kill a man, the timber and bell are both forfeit. *(c)*

If a man in watering his horſe is drowned, the horſe is a deodand. 8 *E.* 2. *Coron.* 401.

If a man fall into the water, and the water carry him under the wheel of a mill, whereby he is killed, the wheel is forfeited, but not the mill. 8 *E.* 2. *Coron.* 389.

If a weight of earth fall upon a worker in a mine and kill him, the weight of earth is forfeit, not the whole mine. 12 *R.* 2. *Forfeiture* 20.

A man falls from his horſe againſt a trunk, whereof he dies, the horſe is forfeit as a deodand, but not the trunk. 3 *E.* 3. *Coron.* 341.

And yet I find a ſtrong authority, that in that caſe the horſe is not forfeited, unleſs he throws his rider.

Clauſ. 5 *E.* 3. *part* 2. *m.* 9. It was found by inquiſition, "Quod "*Willielmus Daventriæ* in parochiâ beatæ *Mariæ Stroud* in com. "*Middleſex*, cum ad-aquavit quendam equum magiſtri ſui, dictuſque

(*b*) A cart met a waggon loaded upon the road, and the cart endeavouring to paſs by the waggon, was driven upon an high bank and over-turned, and threw a perſon, that was in the cart, juſt before the wheels of the waggon, and the waggon ran over him and kild him; it was reſolved in this caſe in the home circuit by *Pollexfen* and *Gregory*, that the cart, waggon, loading, and all the horſes were deodands, becauſe they all moved *ad mortem*. 1 *Salk.* 220.

(*c*) 8 *E.* 2. *Coron* 405. *vide contra Rex verſus* Croſſe, &c. 1 *Sid.* 207.

"*Willielmus*

" *Willielmus* redeundo de eodem equo per infortunium cecidit, & cum " eodem equo per amicos ſuos ſemivivus deductus fuit ad hoſpitium [421] " prædicti magiſtri ſui apud *Fleetſtreet* in ſuburbio *London*, " & ibidem languidus vixit uſque occaſum ſolis, quo tempore " obiit ex caſu prædicto; & quod prædictus equus tempore caſûs " prædicti per aliquem vel aliquam non fuit perterritus, per quod " habuit occaſionem recalcitrandi.

This inquiſition being removed into the chancery by *Certiorari*, thereupon it was adjudged *coram rege & concilio, quod equus prædictus tanquam deodand' regi in hoc caſu non debet adjudicari*, and thereupon a writ iſſues to the ſheriffs and coroners of *London* reciting the inquiſition: " Jamque dictâ certificatione coram nobis & concilio noſtro " inſpecta & plenius examinata, nobis & dicto concilio noſtro videtur, " quòd equus prædictus tanquam deodand' nobis in hoc caſu non " debet adjudicari," commands the ſheriff and coroners, " quod ex- " actionem, quam *Johanni Bleburgh* (the maſter of the horſe) vel " plegiis, vel manucaptoribus ſuis in hâc parte pro equo prædicto vel " ejus pretio nobis tanquam deodand' reddend' feciſtis, ſuperſedeatis " omnino & diſtrictionem in hâc parte factam ſine dilatione relaxetis." *T. R. apud Guildford* 18 *Novemb.*

Which judgment is of greater weight, than any above cited, and may be a great guide in caſes of this nature, and therefore I have cited it at large: 1. It is a reſolution ſubſequent to all thoſe judgments, that are above-mentioned, for the laſt of them is the 3 *E.* 3. and this is 5 *E.* 3. Again, 2. It is a ſolemn judgment given in chancery *coram rege & concilio* upon great examination, and the whole caſe ſtated in the inquiſition, and every man knows, that underſtands any thing of records of thoſe times, that *coram rege & concilio* was the king's legal council, namely the chancellor, treaſurer, keeper of the privy ſeal, juſtices of the one bench and the other, chancellor and barons of the *Exchequer*: theſe uſually met in chancery upon ſuch occaſions under the ſtyle of *concilium*.

3. It is a judgment given by the king and council *againſt* the forfeiture, the whole caſe appearing upon the inquiſition, which is of greater moment, than a judgment given for the king, becauſe given by himſelf and his officers againſt his own intereſt.

2. Now touching deodands of things not moveable.

[422] If a man be drowned in a pit, tho the pit cannot be forfeited, the coroner may charge the townſhip to ſtop the pit, and make entry

entry thereof in his rolls; and if it be not done before the next *eyre* or goal-delivery, the townſhip ſhall be amerced. 8 *E.* 2. *Coron.* 416.

If a man falls from an hay-rick, whereby he dies, it is ſaid (*nota*, not adjudged) that it ſhall be a forfeit. 3 *E.* 3. *Coron.* 348.

If a man be getting up a cart by the wheel to gather plums, and neither the cart nor horſes moving, the man falls and dies, neither the cart nor horſes are forfeit, but only the wheel. 8 *E.* 2. *Coron.* 409.

It ſeems, that if a man be under the age of fourteen years, and falls from a cart or horſe, it ſhall not be a deodand, becauſe he was not of diſcretion to look to himſelf; but if a horſe, bull, or the like kills him, or if a cart runs over him, there it ſhall be a deodand, 8 *E.* 2. *Coron.* 389. *Stamford*'s *P. Cor.* 21. *a Co. P. C. p.* 57. for there it ſhall be imputed to the neglect of the keeper of the goods, that did the miſchief, and ſo it is, if a tree falls upon one within the age of diſcretion, it is a deodand.

Touching deodands in ſhips or boats, theſe things are obſervable:

1. If a ſhip or boat be laden with merchandize, tho it falls out that a man be killed by the motion of the ſhip or boat, yet the merchandize are no deodand, tho it be in the freſh water; but if any particular merchandize falls upon a party, whereby he dies, that particular merchandize ſhall be a deodand, and not the ſhip. *Britton, cap.* 1. *de office de coroner*, §. 13 & 14.

2. If a ſhip or veſſel be ſailing upon the ſea, and a perſon falls out of the ſhip and is drowned, the ſhip is no deodand.

By the antient conſtitutions of the admiralty it ſeems, that if a man were drowned upon the ſea by falling off from the ſhip under ſail, there was no deodand due, nor if he died by the fall of a maſt or ſail-yard, or otherwiſe; but indeed in the articles of inquiry in the court of admiralty, mentiond in the black book of the admiralty, one of the articles is to inquire of them, that take any deodands, beſides the admiral, of any gold, ſilver or jewels found upon any [423] man ſlain upon the ſea, drowned in the ſea, or ſlain with a maſt in the ſhip, or with the yard of the ſhip, or with any other thing, which is the cauſe of the death of any man, that in ſuch caſe *appurtient al admiral per prendre & adminiſtre per l'alme, ce queſt mort, le moiety, & l'autre moiety a doner al feme celui, queſt mort, ſes infans, freres ou ſoers, ſil ad aucunes:* but certainly this never obtaind, for without queſtion the goods of the deceaſed were no deodands, but only the goods that moved to his death.

Rot.

Rot. Par. 51 *E.* 3. *n.* 73. The commons pray, *Que come il ad un cuſtome uſe parmy ceſt realme, que ſi aſcun home ou garſon eſchie hors de aſcun niefe, batelle, ou autre veſſel en le mere, haven, ou autre ewe, & ſoit periſſe, le dit veſſel ad eſtre forfeite au roy, ou autres ſeigneurs de franchiſes*, to the great prejudice of mariners and ſhipping, and therefore pray, *que nul neife, batell, ne autre veſſel ſoit forfeitable deſormes pur le cauſe avant dit.*

Reſp. *En le mere ne doit pas deodand eſtre ajugge, mes quant al ewe freſh le roy ent ferra ſa grace, ou lui pleyſt.*

The like petitions were renewed *Rot. Par.* 1 *H.* 4. *n.* 154. 1 *H.* 5. *n.* 35. 14 *H.* 6. *n.* 26. but they obtaind no other anſwer, than that the law be obſerved.

Yet that anſwer in 51 *E.* 3. is a ſufficient declaration, that no deodand is to be upon ſuch a death happening upon the ſea, and with this difference touching the forfeiture of a ſhip or other thing, as deodands *in mari & in aquâ dulci*, agrees *Bract. Lib.* III. *cap.* 5. *p.* 122. and *cap.* 17. *p.* 136. *in fine, viz.* that *de ſubmerſis in aquâ dulci batelli, de quibus tales ſubmerſi fuerunt, apprecientur, ſed non in mari, nec ſunt deodanda ex infortunio in mari.*

And with the ſame agrees *Fleta, Lib.* I. *cap.* 25. §. 9. *de ſubmerſis, ſi de molendino ceciderit vel carecta vel de batello, quamvis carcatis, dum tamen in aquâ dulci, ſecus quam in ſalſâ*, and goes farther, but too far, *viz.* that the veſſel with its lading, and the cart with its lading, and the mill, with all that is moveable in it, are deodands.

But now, what ſhall be ſaid the ſea or ſalt water?

[424] My lord *Coke, ubi ſupra, viz. p.* 58. ſaith, and that truly, the arm of the ſea is included herein; and by the book of 22 *Aſſize, pl.* 93. ſo far as the ſea flows and reflows is an arm of the ſea.

And thus far of deodands.

I ſhall only add this one thing more relating to the coroner's office touching thoſe, that come to a violent death *de ſubito mortuis:* if the townſhip bury the body before the coroner be ſent for, the townſhip ſhall be amerced; and if the coroner comes not to make his inquiry upon notice given, he ſhall be fined in *eyre*, or in the king's bench, or before the juſtices of goal-delivery.

See Foſter. 265. 266. 267. 287. 288. Blackſ. Com. Lib. I. ch. viii. p. 300. Burn. Tit. Deodand. 1 Hawk. P. C. ch. 26. Quære, if a man ringing a Church-bell be hanged in the bell-rope, whether the bell be forfeited as a deodand, 1 Lev. 136.

CHAP.

CHAP. XXXIII.

Of homicide, *and it's ſeveral kinds, and firſt of thoſe conſiderations that are applicable, as well to* murder *as* manſlaughter.

HAVING diſpatched the buſineſs of *ſuicidium* or ſelf-murder, and *per infortunium ſimplex*, I come now to conſider of homicide, as it relates to others.

And this is of three kinds: 1. Purely voluntary, *viz.* murder and manſlaughter. 2. Purely involuntary, as that other kind of homicide *per infortunium*. 3. Mixt, partly voluntary, and partly involuntary, or in a kind neceſſary, and this again of two kinds, *viz.* inducing a forfeiture, as *ſe defendendo*, or not inducing a forfeiture, as, 1. In defenſe of a man's houſe. 2. Defenſe of his perſon againſt an aſſault *in viâ regiâ*. 3. In advancement or execution of juſtice, and according to this diſtribution I ſhall proceed. [425]

I ſhall begin with thoſe matters conſiderable, which are applicable as well to homicide, as to murder.

Murder is a killing of a man *ex malitiâ præcogitatâ*; *homicide* is killing a man without forethought malice.

It is a miſtake in thoſe, that think, that before the ſtatute of *Marlebridge*, *cap.* 26. all killing of a man, tho *per infortunium* or *ſe defendendo*, was murder, for the ſtatute ſaith, that *murdrum de cætero non adjudicetur coram juſticiariis, ubi infortunium tantummodo adjudicatur, ſed locum habet murdrum de interfectis per feloniam tantum, & non aliter*, and therefore they thought that before this ſtatute a man ſhould be hanged for killing another in his own defenſe. 21 *E.* 3. 17. *b.* *(a)*.

But the truth is, *murdrum* in this caſe was but an amercement, that was antiently impoſed upon a townſhip, where the death of a man happened *(b)*; and this appears by many hundred old charters of the

(a) See alſo 2 *Co. Inſtit. p.* 148. who is of that opinion.

(b) This is ſo plain, that it is matter of ſurprize, that any ſhould miſtake it; the word *murdrum* uſually ſignifying a *ſecret* killing of another, ſo that the murderer was not known, for if the murderer was known, it was not in this ſenſe murder; as if the murderer was taken, & *judicium juſtinuerit, nullum erit murdrum, quia convincitur felonia*, or if the murdered perſon lived for ſome time after his wounds, it was no murder becauſe he might diſcover the murderers, the meaning of which is not, that the offender would not in thoſe caſes be liable to be indicted and puniſhed for murder, but that the vill or townſhip would not in ſuch caſes be liable to any amerciament. *Bract. Lib.* III. *de corona, cap.* 15. *p.* 135. *a. Wilk. Leg. Anglo-Sax. p.* 280. *vide ſupra p.* 39. *in notis, vide poſtea cap.* 35. See alſo *Kelynge* 121.

kings of *England*, eſpecially to biſhops and monaſteries, whereby it was granted, that they and their poſſeſſions ſhould be quit *de murdro & latrocinio* among divers other immunities, whereby we muſt not think that they had power granted them to commit murder or theft, but they were thereby acquitted of thoſe common amercements, uſually in thoſe antient times impoſed in *eyre* upon vills for murder and theft committed there.

To make up the crime of homicide or murder there muſt be theſe three concurring circumſtances.

I. The party muſt be killed, antiently indeed a barbarous aſſault with an intent to murder, ſo that the party was left for dead, but yet recovered again, was adjudged murder and petit treaſon, 15 [426] *E.* 2. *Coron.* 383. but that holds not now, for the ſtroke without the death of the party ſtricken, nor the death without the ſtroke or other violence makes not the homicide or murder, for the death conſummates the crime.

It remains therefore to be conſidered, to what intents the offenſe of murder or manſlaughter relates to the ſtroke or other cauſe of the death, and to what purpoſes it relates to the death only.

If a man gives another a mortal ſtroke, and he lives a month, two or three, or more, and die within the year and day, the title of the lord by eſchete to avoid meſne incumbrances relates to the ſtroke given, and not only to the death. *Plowd. Com.* 263. Dame *Hale*'s caſe.

If a man give another a mortal ſtroke, and he dies thereof within a year and a day, but meſne between the ſtroke and the death there comes a general pardon, whereby all miſdemeanors are pardoned, this doth pardon the felony conſequentially, becauſe the act, that is the offenſe, is pardoned, tho it be not a felony till the party die. *Ibid.* 401. *Cole*'s caſe.

If a mortal ſtroke be given on the high ſea, and the party comes to land in *England* and die, the admiral ſhall not have juriſdiction in this caſe to try the felon, becauſe the death that conſummated the felony, happened upon the land, nor the common law ſhall not try him, becauſe the ſtroke, that made the offenſe, was not *infra corpus comitatûs*, 5 *Co. Rep.* 106. *b.* Sir *Henry Conſtable*'s caſe, 2 *Co. Rep.* 93. *a. Bingham*'s caſe, *Co. P. C. p.* 48. and *Lacie*'s caſe 25 *Eliz.* cited there to that purpoſe; *de quo alibi.*

At common law, if a man had been ſtricken in one county and died in another, it was doubtful whether he were indictable or triable in either,

either, but the more common opinion was, that he might be indicted where the ſtroke was given, for the death is but a conſequent, and might be found tho in another county. 9 *E.* 4. 48. 7 *H.* 7. 8. and if the party died in another county, the body was removed into the county, where the ſtroke was given, for the coroner to take an inqueſt *ſuper viſum corporis*, 6 *H.* 7. 10. but now by the ſtatute of 2 & 3 *E.* 6. *cap.* 24. the juſtices or coroner of the county, where the party died, ſhall inquire and proceed, as if the ſtroke had been in the ſame county, where the party died. [427]

On the other ſide, as to ſome reſpects, the law regards the death as the conſummation of the crime, and not merely the ſtroke.

If a party be kild in one county, the coroner *ſuper viſum corporis* might at common law inquire of all acceſſaries or procurers before the fact, tho the procurement were in another county, 20 *H.* 7. *Kelw.* 67. *b. per omnes juſticiarios Angliæ*; but now by the ſtatute of 2 & 3 *E.* 6. *cap.* 24. the indictment and trial of the acceſſaries ſhall be in the county, where they were acceſſary, *viz.* procuring, abetting or receiving.

If a party be mortally wounded, and the offender taken and in the cuſtody of the conſtable, and he ſuffers him to eſcape before the wounded perſon die, it is not felony in the conſtable, tho he die after within the year. 11 *H.* 4. 12. *Plow. Com.* 401. *Cole's* caſe.

If a ſtroke be given the 1ſt of *January*, and the party die the 1ſt of *March* following, the year and day to bring an appeal is to be accounted from the death, and not from the ſtroke, contrary to the opinion of *Stamford P. C.* 63. *a. quod vide Co. P. C. p.* 53. & *ſur ſtatute de Glouc. cap.* 9. *(c)*, 4 *Co. Rep.* 42. *b. Haydon's* caſe, *Satut.* 3 *H.* 7. *cap.* 1.

If *A.* gives a mortal ſtroke the 1ſt of *January*, and the party lives till the 1ſt of *February*, and then dies of the ſtroke, the concluſion of the indictment is beſt, *Et ſic præfatus* A. &c. *modo & formâ prædictâ interfecit & murdravit*, becauſe it applies to the whole caſe. 2. But if it be, *Et ſic præfatus* A. *prædicto* 1 *Januarii ipſum*, &c. *interfecit & murdravit*, it is naught, becauſe it is no murder till the party dies, 4 *Co. Rep.* 42. *Haydon's* caſe, *vide ibidem Katharine Hume's* caſe. 3. But if it concludes, *Et ſic præfatus* A. *ipſum*, &c. *prædicto* 1 *Februarii interfecit & murdravit*, it is good, becauſe then the murder is

(c) 2 *Co. Inſtit.* 320.

complete, 4 *Co. Rep.* 47. *a. Wigge's* caſe, tho in ſuch a caſe of a ſtroke at one day or one place, and a death at another day or place,

[428] the beſt concluſion, and that which is in common uſe at this day is, *Et ſic prædictus* A. *ipſum, &c. modo & forma prædictis interfecit & murdravit,*

And thus far touching the relation to the ſtroke or death.

Now what ſhall be ſaid a killing and death within the year and day.

If a man give another a ſtroke, which it may be, is not in itſelf ſo mortal, but that with good care he might be cured, yet if he die of this wound within the year and day, it is homicide or murder, as the caſe is, and ſo it hath been always ruled.

But if the wound or hurt be not mortal, but with ill applications by the party, or thoſe about him, of unwholeſome ſalves or medicines the party dies, if it can clearly appear, that this medicine, and not the wound, was the cauſe of his death, it ſeems it is not homicide, but then that muſt appear clearly and certainly to be ſo.

But if a man receives a wound, which is not in itſelf mortal, but either for want of helpful applications, or neglect thereof, it turns to a gangrene, or a fever, and that gangrene or fever be the immediate cauſe of his death, yet, this is murder or manſlaughter in him that gave the ſtroke or wound, for that wound, tho it were not the immediate cauſe of his death, yet, if it were the mediate cauſe thereof, and the fever or gangrene was the immediate cauſe of his death, yet the wound was the cauſe of the gangrene or fever, and ſo conſequently is *cauſa cauſati.*

If a man be ſick of ſome ſuch diſeaſe, which poſſibly by courſe of nature would end his life in half a year, and another gives him a wound or hurt, which haſtens his end by irritating and provoking the diſeaſe to operate more violently or ſpeedily, this haſtening of his death ſooner than it would have been is homicide or murder, as the caſe happens, in him, that gives the wound or hurt, for he doth not die ſimply *ex viſitatione dei*, but the hurt that he receives haſtens it, and an offender of ſuch a nature ſhall not apportion his own wrong, and thus I have often heard that learned and wiſe judge Juſtice *Rolle* frequently direct.

[429] If a man either by working upon the fancy of another or poſſibly by harſh or unkind uſage puts another into ſuch paſſion of grief or fear, that the party either dies ſuddenly, or contracts ſome diſeaſe, whereof he dies, tho, as the circumſtances of the

the caſe may be, this may be murder or manſlaughter in the ſight of God, yet *in foro humano* it cannot come under the judgment of felony, becauſe no external act of violence was offered, whereof the common law can take notice, and ſecret things belong to God; and hence it was, that before the ſtatute of 1 *Jac. cap.* 12. witchcraft or faſcination was not felony, becauſe it wanted a trial, tho ſome conſtitutions of the civil law make it penal.

If a phyſician gives a perſon a potion without any intent of doing him any bodily hurt, but with an intent to cure or prevent a diſeaſe, and contrary to the expectation of the phyſician it kills him, this is no homicide, and the like of a chirurgeon, 3 *E.* 3. *Coron.* 163. And I hold their opinion to be erroneous, that think, if he be no licenſed chirurgeon or phyſician, that occaſioneth this miſchance, that then it is felony, for phyſic and ſalves were before licenſed phyſicians and chirurgeons; and therefore if they be not licenſed according to the ſtatute of 3 *H.* 8. *cap.* 11. or 14 *H.* 8. *cap.* 5. they are ſubject to the penalties in the ſtatutes, but God forbid that any miſchance of this kind ſhould make any perſon not licenſed guilty of murder or manſlaughter.

Theſe opinions therefore may ſerve to caution ignorant people not to be too buſy in this kind with tampering with phyſic, but are no ſafe rule for a judge or jury to go by: we ſee the ſtatute of 34 & 35 *H.* 8. *cap.* 8. diſpenſeth with the penalty of thoſe former ſtatutes, as to outward applications and medicines for agues, ſtone, or ſtrangury, which may be adminiſtered by any perſon, and the preamble of the ſtatute tells us, that if none but licenſed chirurgeons ſhould be uſed in many caſes, many of the king's ſubjects were like to periſh for want of help.

But if a woman be with child, and any gives her a potion to deſtroy the child within her, and ſhe takes it, and it works ſo ſtrongly, that it kills her, this is murder, for it was not given to cure her of a diſeaſe, but unlawfully to deſtroy her child within her, and therefore he that gives a potion to this end, muſt take the hazard, and if it kills the mother, it is murder, and ſo ruled before me at the aſſizes at *Bury* in the year 1670. [430]

And certainly if that opinion ſhould obtain, that if one not licenſed a phyſician ſhould be guilty of felony, if his patient miſcarry, we ſhould have many of the poorer ſort of people, eſpecially remote from *London*, die for want of help, leſt their intended helpers might miſcarry.

This doctrine, therefore, that if any dies under the hand of an unlicenſed phyſician, it is felony, is apochryphal, and fitted, I fear, to gratify and flatter doctors and licentiates in phyſic, tho it may, as I ſaid, have its uſe to make people cautious and wary, how they take upon them too much in this dangerous employment.

If a man have a beaſt, as a bull, cow, horſe or dog, uſed to hurt people, if the owner know not his quality, he is not puniſhable, but if the owner be acquainted with his quality, and keeps him not up from doing hurt, and the beaſt kills a man, by the antient *Jewiſh* law (*) the owner was to die for it, *Exod.* xxi. 29, and with this ſeems to agree the book of 3 *E.* 3. *Coron.* 311. *Stamf. P. C.* 17. *a.* wherein theſe things ſeem to be agreeable to law.

1. If the owner have notice of the quality of his beaſt, and it doth any body hurt, he is chargeable with an action for it.

2. Tho he have no particular notice, that he did any ſuch thing before, yet if it be a beaſt, that is *feræ naturæ*, as a lion, a bear, a wolf, yea an ape or monkey, if he get looſe and do harm to any perſon, the owner is liable to an action for the damage, and ſo I knew it adjudged in *Andrew Baker*'s caſe, whoſe child was bit by a monkey, that broke his chain and got looſe.

3. And therefore in caſe of ſuch a wild beaſt, or in caſe of a bull or cow, that doth damage, where the owner knows of it, he muſt at his peril keep him up ſafe from doing hurt, for tho he uſe his diligence to keep him up, if he eſcape and do harm, the owner is liable to anſwer damages.

[431] 4. But as to the point of felony, if the owner have notice of the quality of the ox, &c. and uſe all due diligence to keep him up, yet the ox breaks looſe and kills a man, this is no felony in the owner, but the ox is a deodand.

5. But if he did not uſe that due diligence, but thro negligence the beaſt goes abroad after warning or notice of his condition, and kills a man, I think it is manſlaughter in the owner.

6. But if he did purpoſely let him looſe, or wander abroad with deſign to do miſchief, nay tho it were with deſign only to fright people and make ſport, and it kills a man, it is murder in the owner, and I have heard, that long ſince at the aſſizes held at *St. Albans* for *Hertfordſhire* it was ſo ruled, and the owner hanged for it, but this is but an hearſay.

(*) *Vide ſupra p.* 3. *in notis.*

it,

If a man lay poiſon to kill rats, and a man caſually takes it, whereby he is poiſoned, this is no felony, but if a man lays poiſon to the intent that *B.* ſhould take it, to be poiſoned therewith, and *C.* by miſtake take it, and is poiſoned to death, this is murder, tho it were not intended for him. *Dalt. cap.* 93. *(d).* 9 *Co. Rep.* 81. *b. Agnes Gore*'s caſe, *Plowd. Com.* 474 *Sander*'s caſe.

And altho the party takes the poiſon himſelf by the perſuaſion of another in the abſence of the perſuader, yet it is a killing by the perſuader, and he is principal in it, tho abſent at the taking of it. 4 *Co. Rep.* 44. *b. Vaux*'s caſe.

If *A.* gives poiſon to *B.* intending to poiſon him, and *B.* ignorant of it, gives it to *C.* a child, or other near relation of *A.* againſt whom he never meant harm, and *C.* takes it and dies, this is murder in *A.* and a poiſoning by him, *Plowd. Com.* 474. *a. Dalt. cap.* 93. but *B.* becauſe ignorant, is not guilty.

If *A.* gives purging comfits to *B.* to make ſport, and not to hurt him, and *B.* dies thereof, it is a killing by *A.* but not murder, but manſlaughter. *Dalt. cap.* 93.

There are ſeveral ways of killing, 1. By expoſing a ſick or weak perſon or infant unto the cold to the intent to deſtroy him, 2 *E.* 3. 18. *b.* whereof he dieth. 2. By laying an impotent perſon abroad, ſo that he may be expoſed to and receive mortal harm, as laying an infant in an orchard, and covering it with leaves, [432] whereby a kite ſtrikes it, and kills it. 6 *Eliz. Crompt. de Pace* 24. *Dalt. cap.* 93. *(e).* 3. By impriſoning a man ſo ſtrictly that he dies, and therefore where any dies in gaol, the coroner ought to be ſent for to enquire the manner of his death. 4. By ſtarving or famine. 5. By wounding or blows. 6. By poiſoning. 7. By laying noiſome and poiſonous filth at a man's door, to the intent by a poiſonous air to poiſon him, Mr. *Dalton, cap.* 93. out of Mr. *Cook*'s reading. 8. By ſtrangling or ſuffocation.

Moriendi mille figuræ.

A man infected with the plague, having a plague-ſore running upon him, goes abroad, this is made felony by the ſtatute of 1 *Jac. cap.* 31. but is now diſcontinued *(f)*; but what if ſuch perſon goes abroad, to the intent to infect another, and another is thereby in-

(*d*) *New Edit.* 1727. *cap.* 145. *p.* 471.
(*e*) *New Edit. cap.* 145. *p.* 469.
(*f*) It was made at firſt to continue no longer, than until the end of the firſt ſeſſion of the next parliament.

fected and dies? whether this be not murder by the common law might be a queſtion, but if no ſuch intention evidently appears, tho *de facto* by his converſation another be infected, it is no felony by the common law, tho it be a great miſdemeanor, and the reaſons are,

1. Becauſe it is hard to diſcern, whether the infection ariſe from the party, or from the contagion of the air, it is God's arrow, and

2. Nature prompts every man, in what condition ſoever, to preſerve himſelf, which cannot be well without mutual converſation.

3. Contagious diſeaſes, as plague, peſtilential fevers, ſmall pox, *&c.* are common among mankind by the viſitation, and the extenſion of capital puniſhments in caſes of this nature would multiply ſevere puniſhments too far, and give too great latitude and looſe to ſevere puniſhments.

II. the ſecond conſideration, that is common both to murder and manſlaughter, is, who ſhall be ſaid a perſon, the killing of whom ſhall be ſaid murder or manſlaughter.

[433] If a woman be quick or great with child, if ſhe takes, or another gives her any potion to make an abortion, or if a man ſtrike her, whereby the child within her is *killed*, it is not murder nor manſlaughter by the law of *England*, becauſe it is not yet *in rerum natura*, tho it be a great crime, and by the judicial law of *Moſes (g)* was puniſhable with death, nor can it legally be made known, whether it were killed or not, 22 *E.* 3. *Coron.* 263. ſo it is, if after ſuch child were born alive, and baptized, and after die of the ſtroke given to the mother, this is not homicide. 1. *E.* 3. 23. *b. Coron.* 146.

But if a man procure a woman with child to deſtroy her infant, when born, and the child is born, and the woman in purſuance of that procurement kill the infant, this is murder in the mother, and the procurer is acceſſary to murder, if abſent, and this, whether the child were baptized or not. 7 *Co. Rep.* 9. *Dyer* 186.

The killing of a man attaint of felony, otherwiſe than in execution of the ſentence by a lawful officer lawfully appointed, is murder or manſlaughter, as the caſe happens, and tho there was ſome doubt, whether the killing of a perſon outlawed of felony were homicide or no, 2 *E.* 3. 6. yet it is homicide in both caſes. 27 *Aſſiz.* 41. *Coron.* 203.

(g) *Exod.* xxi, 22.

If

If a perſon be condemned to be hanged, and the ſheriff behead him, this is murder, and the wife may have an appeal. 33 *H.* 6. 58. *(h)*

If a man be attaint in a *præmunire* whereby he is put out of the king's protection, the killing of him was held not homicide, 24 *H.* 8. *B. Coron.* 197. But the ſtatute of 5 *Eliz. cap.* 1 *(i)* hath now put that out of queſtion, declaring it to be unlawful. *(k)*

If a man kills an alien enemy within this kingdom, yet it is felony, unleſs it be in the heat of war, and in the actual exerciſe thereof.

III. The third inquiry is, who ſhall be ſaid a perſon killing. [434]

An infant under the age of fourteen, years in preſumption of law is ſuppoſed without diſcretion, and therefore *primâ facie* he cannot commit murder or manſlaughter, but being indicted thereof, upon not guilty pleaded he ought to be found not guilty.

But if he be above that age, in preſumption of law he is of diſcretion, and may be guilty.

But if he be under the age of fourteen, yet if upon circumſtances it can appear, that he hath diſcretion, he may be convict of felony. 3 *H.* 7. 1. *b.* 12. *a. (l)*

If a man be *non compos mentis*, and kill a man, he is to plead not guilty, and ſhall be acquitted, and is not driven to purchaſe a pardon, tho antiently it was ſo uſed. *Stamford's P. C.* 16. *b.* & *libros ibi.*

And the ſame law it is of a lunatic, that kills a man in the time of his lunacy; but if it be in thoſe intervals, when he hath his underſtanding, then he is a felon, *ſed de his ſupra. p.* 31.

If there be an actual forcing of a man, as if *A.* by force take the arm of *B.* and the weapon in his hand, and therewith ſtabs *C.* whereof he dies, this is murder in *A.* but *B.* is not guilty. *Dalt. cap.* 93. *p.* 242. *(m) Plowd. Com*, 19. *a.*

But if it be only a moral force, as by threatning, dureſs, or impriſonment, &c. this execuſeth not.

A *feme covert* is in law under the coercion of her huſband, and therefore, if ſhe commit larciny or burglary together with her huſ-

(b) See alſo *Co. P. C. p.* 52. *quære*, in caſe of treaſon, (where the ſentence is, that the party ſhall be hanged, but not till he be dead, &c.) if the king remit all, but the hanging, whether it be not murder in the ſheriff to hang him till he be dead?

(i) In fine.

(k) See *Coron.* 203. where it is declared felony to kill one outlawed for felony.

(l) Vide ſupra, p. 27.

(m) New Edit. cap. 145. *p.* 473.

band,

band, the huſband is in law guilty, but regularly the wife is not guilty. *Stamf.* 26. *a. Coron.* 160. *Dalt. cap.* 104. *p.* 267 *(n)*

But if ſhe commit murder, or treaſon, or manſlaughter, it is no plea to ſay ſhe did it by coercion of her huſband, but ſhe is guilty, tho committed with her huſband. *Dalt. Ibid.*

See Foſter's Diſcourſe II. of homicide per tot. 255. &c. &c. Black. Com. Lib. iv. ch. iv. p. 60. ch. xiv. p. 188, 189. &c. 1 Hawk. P. C. ch. 28, 29, 30, 31, 32. 3 Wilſon. 405, &c. Foſter. 70. The caſe of William York.

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[435]

CHAP. XXXIV.

Concerning commanding, counſelling, *or* abetting *of murder or manſlaughter.*

ALTHO this title may ſeem more proper under the title of *principal* and *acceſſaries*, yet becauſe it relates to the inquiry, who ſhall be ſaid a murderer or manſlayer, and is common in ſome reſpects to both crimes, I ſhall take up the conſideration thereof here.

He that counſels, commands, or directs the killing of any perſon, if he be abſent, is an acceſſary to murder before the fact.

In caſe of poiſoning, he that counſels another to give poiſon, if that other doth it, the counſeller, if abſent, is but acceſſary *before Coke P. C. p.* 49. Sir *Thomas Overbury*'s caſe. *(a)*

But he that actually gives or lays the poiſon to the intent to poiſon, tho he be abſent, when it is taken by the party, yet he is principal, and this was *Weſton*'s caſe *(b)*, *Co. P. C. p.* 49. in Sir *Thomas Overbury*'s caſe, and 4 *Co. Rep.* 44. *b. Vaux*'s caſe.

In caſe of murder, he that counſelled or commanded before the fact, if he be abſent at the time of the fact committed, is acceſſary before the fact, and tho he be in juſtice equally guilty with him that commits it, yet in law he is but acceſſary before the fact, and not principal.

If *A.* commands *B.* to beat *C.* and he beats him ſo that he dies thereof, it is murder in *B.* and *A.* if preſent, is alſo guilty of the offenſe, if abſent, he is acceſſary to murder. *Dalt. cap.* 93. *(c)*. *Plowd. Com.* 475. *b. Co. P. C. p.* 51. 3 *E.* 3. *Coron.* 314.

(n) *New Edit. cap.* 157. *p.* 503.
(a) See *State Tr. Vol.* I. *p.* 331.
(b) *State Tr. Vol.* I. *p.* 313.
(c) *New Edit. cap.* 145. *p.* 472.

If

If *A.* counſel *B.* to poiſon his wife, *B.* accordingly obtains poiſon from *A.* and gives it his wife in a roaſted apple, the wife gives it to a child of *B.* not knowing it was poiſon, who eats it and dies, this is murder in *B.* tho he intended nothing to the child. *Plowd. Com.* 474. *Saunder*'s caſe: and ſo it is, if an apothecary ſends a potion to the wife, and the huſband mingle poiſon with it, and upon ſome diſlike of the phyſic the apothecary is ſent for, who to juſtify it to be wholeſome voluntarily eats part of it, and is poiſoned and dies, this is murder in *B.* tho the apothecary was never intended to be hurt, but voluntarily took it. 9 *Co. Rep.* 81. *Agnes Gore*'s caſe.

But in this caſe, he who was abſent, and counſelled the poiſoning of the wife, is not acceſſary to the murder, becauſe as to him the command ſhall not be conſtrued further, than as to the perſon intended by him. *Plowd. Com.* 474. *Saunder*'s caſe. *(d)*

If *A.* counſel or commands *B.* to beat *C.* with a ſmall wand or rod, which could not, in all human reaſon, cauſe death, if *B.* beats *C.* with a great club, or wound him with a ſword, whereof he dies, it ſeems, that *A.* is not acceſſary, becauſe there was no command of death, nor of any thing, that could probably cauſe death, and *B.* hath varied from the command in ſubſtance, and not in circumſtance.

If *A.* command or counſel *B.* to kill *C.* and before the fact done *A.* repents, and comes to B. and expreſly diſcharges him from the fact, and countermands it, if after this countermand *B* doth it, it is murder in *B.* but *A.* is not acceſſary, but if *A.* repent of it, but before any diſcharge or countermand given to *B. B.* kills *C.* yet *A.* remains acceſſary notwithſtanding his private repentance, for in as much as his expreſs counſel or command occaſions the fact, he muſt at his peril ſee, that he countermand *B.* and ſo remedy as much as in him lies the miſchief, that his former command occaſioned. *Ca. P. C.* [437] *p.* 51. *Plowd. Com.* 476. *a. Saunder*'s caſe.

In manſlaughter there can be no acceſſaries before the fact, for it is preſumed to be ſudden, for if it were with advice, command, or deliberation, it is murder and not manſlaughter, and the like of *ſe defendendo.*

(*d*) But tho the judges were of opinion in this caſe, that he was not acceſſary, yet they thought it propereſt that he ſhould be delivered rather by a pardon, than otherwiſe, and accordingly they kept him in priſon from one ſeſſion till another, till he procured a pardon; and maſter *Plowden*, the reporter, ſays, it was his opinion, that whoever counſels or commands an evil thing ſhould be adjudged acceſſary to all, which follows from that evil action, but not from any other diſtinct thing.

And

And therefore in an indictment of manſlaughter only, if others be indicted as acceſſaries before the fact, the indictment is void againſt them.

And if *A.* be indicted of murder, and *B.* as acceſſary before by procurement, &c. and *A.* is found guilty only of manſlaughter, *B.* ſhall be diſcharged. 4 *Co. Rep.* 43. *b. Goffe* verſus *Bibithe* and *Hoell David.*

And anciently, he that ſtruck the ſtroke, whereof the party died was only the principal, and thoſe, that were preſent, aiding, and aſſiſting, were but in the nature of acceſſaries, and ſhould not be put upon their trial, till he that gave the ſtroke were attaint by outlawry or judgment. 40 *Aſſ.* 25. 40 *E.* 2. 42. *a.*

But at this day, and long ſince, the law hath been taken otherwiſe, and namely, that all that are preſent, aiding, and aſſiſting, are equally principal with him that gave the ſtroke, whereof the party died. 4 *H.* 7. 18. *a. per omnes juſticiarios utriuſque banci*, for tho one gave the ſtroke, yet in interpretation of law it is the ſtroke of every perſon, that was preſent, aiding, and aſſiſting, and tho they are called principals in the ſecond degree, yet they are principals, and the law was altered herein, *in tempore H.* 4. *Plowd. Com.* 100. *a.* and therefore, if there be an indictment of murder or manſlaughter againſt *A.* that *A. felonicè*, &c. *percuſſit B.* whereof he died, and that *C.* and *D.* were preſent, abetting, aiding, and aſſiſting to *A. ad feloniam & murdrum &c. modo & formâ prædictâ faciend'*, and *A.* appears not, but *B.* and *C.* appear, they ſhall be arraigned, and receive their judgment if convict, tho *A.* neither appears, nor be outlawed. *Plowd. Com.* 97 and 100. *Gyttin*'s caſe.

If *A.* be indicted as having given the mortal ſtroke, and *B.* and *C.* as preſent, aiding, and aſſiſting, and upon the evidence it [438] appear, that *B.* gave the ſtroke, and *A.* and *C.* were only aiding and aſſiſting, it maintains the indictment, and judgment ſhall be given againſt them all, for it is only a circumſtantial variance, for in law it is the ſtroke of all that were preſent, aiding, and abetting. *Plowd. Com.* 98. *a.* 9 *Co. Rep.* 67. *b. Mackally*'s caſe.

Yet the circumſtances of the caſe may vary the degree of the offenſe in thoſe that are in this kind parties to the homicide.

If *A.* have malice againſt *B.* and lies in wait to kill him, and *C.* the ſervant of *A.* being preſent, but not privy to the intent of his maſter, finds his maſter fighting with *B.* takes part with his maſter, and the

ſervant

ſervant or maſter kill *B.* this is murder in *A.* becauſe he had malice forethought, but only homicide in *C. Plowd. Com.* 100. *b. Saliſbury's* caſe, where it was alſo reſolved, that where *A.* had malice againſt *D.* the maſter of *B.* but by miſtake aſſaults and kills *B.* the ſervant, or having malice againſt *D.* the maſter, and *B.* his ſervant comes in aid of his maſter, and *A.* kills him, it is murder in *A.* as much as if he had killed the maſter, for the malice ſhall be carried over to make the killing of *B.* murder.

Upon an indictment of murder, tho the party upon his trial be acquit of murder, and convict of manſlaughter, he ſhall receive judgment, as if the indictment had been of manſlaughter, for the offenſe in ſubſtance is the ſame.

And upon the ſame reaſon it is in caſe of malice implied, if *A. B.* and *C.* be in a tumult together, and *D.* the conſtable comes to appeaſe the affray, and *A.* knowing him to be the conſtable kill him, and *B.* and *C.* not knowing him to be the conſtable, come in, and finding *A.* and *D.* ſtruggling, aſſiſt and abet *A.* in killing the conſtable, this is murder in *A.* but manſlaughter in *B.* and *C.*

To make an abetter to a murder or homicide principal in the felony, there are regularly two things requiſite, 1. He muſt be preſent. 2. He muſt be aiding and abetting *ad feloniam & murdrum ſive homicidium.*

If he were procuring, or abetting, and abſent, he is acceſſary in caſe of murder, and not principal, as hath been [439] ſhewn, unleſs in ſome caſes of poiſoning, *ut ſupra.*

If he be preſent, and not aiding or abetting to the felony, he is neither principal nor acceſſary.

If *A.* and *B.* be fighting, and *C.* a man of full age comes by chance, and is a looker on only, and aſſiſts neither, he is not guilty of murder or homicide, as principal in the ſecond degree, but it is a miſpriſion, for which he ſhall be fined, unleſs he uſe means to apprehend the felon. 8 *E.* 2. *Coron.* 395. 3 *E.* 3. *ibidem* 293. 14 *H.* 7. 31. *b. Stamford's P. C.* 40. *b. Dalton, cap.* 108. *p.* 284. *(e)*

Therefore it remains to be inquired, 1. Who ſhall be ſaid to be preſent. 2. Who ſhall be ſaid abetting, aiding or aſſiſting to the felony.

I. As to the firſt: if divers perſons come to make an affray, *&c.* and are of the ſame party, and come into the ſame houſe, but are in ſeveral rooms of the ſame houſe, and one be *killed* in one of the rooms,

(e) New Edit. cap. 161. *p.* 527.

thoſe